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NO. _____

SUPREME COURT OF THE UNITED STATES
Winter Term - 1982

FRANKLIN COUNTY SHERIFF'S OFFICE
Petitioner,

-vs-

BETTY SELLERS
Complainant/Respondent

and

WASHINGTON STATE HUMAN RIGHTS COMMISSION
Respondent.

On Appeal from the Supreme Court
of Washington

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

FRANKLIN COUNTY SHERIFF'S OFFICE, Petitioner, vs- BETTY SELLERS, Complainant/Respondent, and- WASHINGTON STATE HUMAN RIGHTS COMMISSION, Respondent.	NO._____ PETITION FOR WRIT OF CERTIORARI

Application is made by the Franklin County Sheriff's Office in the State of Washington for a Writ of Certiorari.

Rule 21.1.(a) Questions Presented for Review.

.(i). Was the Tribunal of Judges before which the Franklin County Sheriff's Office was tried in suit brought by the Washington State Human Rights Commission properly constituted under the Fourteenth Amendment due process clause of the

United States Constitution when said Tribunal was appointed and operated by the Washington State Human Rights Commission itself?

.(ii). Under the special facts of this case was the Tribunal of Judges properly constituted, qualified and operated under the due process clause of the Fourteenth Amendment of the Constitution of the United States?

.(iii). Is a Tribunal of the Washington State Human Rights Commission providing Fourteenth Amendment due process when deciding by judges:

.a. Who give a special limiting oath;

.b. Who are appointed by the Human Rights Commission case by case without tenure, and without legislatively established standards of appointment as a lay peoples' court but who may have private knowledge of facts.

.c. Who can be dismissed by the

Human Rights Commission with the only penalty being non-reappointment to a subsequent case;

.d. Who are so specially interested, not disinterested, they serve free;

.e. Who then have their compensation substantially increased during the pendency of this particular case;

.f. Who decided issues between two persons when their appointing Human Rights Commission is the advocate for one before these very judges;

.g. Who make Findings of Fact with non-reviewable finality;

.h. Whose findings cannot be supplemented by additional evidence at the Superior Court level?

Rule 21.1.(b) Parties.

.(i). Franklin County Sheriff's Office, Petitioner;

.(ii). Betty Sellers, Complainant/Respon-

dent;

.(iii). Washington State Human Rights Commission, Respondent.

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Note: RCW means Revised Code of Washington. WAC means Washington Administrative Code.

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Rule 21.1.(d)

.(i). The Opinion of the Tribunal in this case is in case number P-41-74 of the Washington State Human Rights Commission. Washington State Human Rights Reporter, WD-260, December, 1977, Donworth, Taylor and Co.; Book Publishing Company. (appears as Appendix No. 1 .)

.(ii). The Opinion of the Superior Court of Franklin County, Washington is case number 23165 and is not known to be published. (appears as Appendix No. 2 .)

.(iii). The Opinion of the Court of Appeals is published as 27 Wn.App. 797, 621 P.2d 751. (appears as Appendix No. 3 .)

.(iv). The Opinion of the Supreme Court of Washington is published as 97 Wn.2d 317, 646 P.2d 113. (appears as Appendix No. 4 .)

Rule 21.1.(e) Grounds of Jurisdic-

tion.

.(i). Judgment by opinion of the Washington State Supreme Court was confirmed May 13, 1982. (see Appendix No. 4.)

.(ii). Reconsideration was denied June 29, 1982. (appears as Appendix No. 10.) The order of the United States Supreme Court dated September 21, 1982, Extending Time to File Petition for Writ of Certiorari extended time to file to and including November 1, 1982. No. A-286. (appears as Appendix No. 6.)

.(iii). Not applicable.

.(iv). 28 USCS, sec. 1257. State courts; appeal; certiorari.

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
> (2) By appeal, where is drawn in question the validity of a statute

of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.
(June 25, 1948, c. 646, sec. 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, Sec. 172(a)(1), 84 Stat. 590.)"

Petitioner relies on subsection (3) above, and if necessary for review this application should be alternately construed as an appeal. Then subsection (2) above applies.

Rule 21.1.(f)

The Constitutional provisions,

No. 14.)

R.C.W. 49.60.180(1) (appears as Appendix No. 14.)

R.C.W. 49.60.250 (appears as Appendix No. 15.)

R.C.W. 49.60.250, as amended (appears as Appendix No. 16.)

.(iii). Regulations - Washington Administrative Code

WAC 162-08-061 (appears as Appendix No. 17.) Reserved

WAC 162-08-072 (appears as Appendix No. 18.)

WAC 162-08-201 (appears as Appendix No. 19.)

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WAC 162-08-211(6) (appears as Appendix No. 20.)

WAC 162-08-212 (appears as Appendix No.

21.)

WAC 162-08-215 (appears as Appendix No. 22.)

Note: Copies of Statutes and Regulations are set forth in the Appendix.

Rule 21.1.(g) Statement of Material Facts.

The Washington State Human Rights Commission commenced action before itself the Washington State Human Rights Commission. A Tribunal of three was appointed by the Commission's Chairman in accordance with statutes of the State of Washington and Rules established by said Commission. Objection was made that the Tribunal was not constitutionally constituted, qualified or operated. The Tribunal decided in Findings of Fact and Conclusions of Law in favor of the Commission (Appendix No. 7) which appointed them and in favor of Betty Sellers nomi-

nal party complainant, and then ordered $7,200 damages together with issuing certain other orders to the County. (Appendix No. 5.)

On appeal to the Superior Court of the State of Washington this judgment-decree was affirmed. Constitutionality was upheld in Findings of Fact and Conclusions of Law. (Appendix No. 8.) On appeal to the Court of Appeals this judgment-decree was reversed but on the Commission's appeal to the Washington State Supreme Court, the judgment-decree of the Tribunal and the Superior Court were reinstated. In the Tribunal and all courts, objection was made that the Tribunal was not properly constituted or operated under the due process clause of the Fourteenth Amendment to the United States Constitution. See the next subsection confirming the basis of juris-

diction under the Constitution and laws of the United States.

The judgment-decree will stand if the Tribunal was constitutionally constituted, qualified and operated. If not, then the judgment-decree will fall with the unconstitutionality of the Tribunal and its actions.

This Petition for Writ of Certiorari requests the United States Supreme Court to hold the judgment-decree at naught because the statutes and regulations under which the Tribunal in this case was appointed and operated was unconstitutional under the Fourteenth Amendment.

During the pendency of this case and not applicable to it, the Washington State Legislature has established an independent body of Administrative Judges assigned by an independent Chief Judge

to particular cases for almost all administrative hearings in the State of Washington, including those of the Washington State Human Rights Commission.[1]

(In other words, the war was won against agency appointed Judges in the legislature but the battle against such Tribunal Judges in this particular case was lost before the State Supreme Court.) We ask this Court to reverse the Washington State Supreme Court and hold this Tribunal, its appointment and function unconstitutional under the Fourteenth Amendment of the United States Constitution.

The Legislature gave no relief to protesters in pending cases.

Forty-one states like Washington in our case have agency appointed Judges

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[1] See p. 14,26 infra. R.C.W. 49.60.250 (Appendix No. 16.), effective July 1, 1982.

in administrative hearings. Eleven have independent judges.[2]

The Franklin County Sheriff's Office was tried before agency appointed Tribunal Judges:

.(i). Who gave a special pledge more limiting than that given by the President of the United States; (see Appendix No. 20.)

.(ii). Who were appointed by the Administrative body trying the respondent; (see Appendix No. 15.)

.(iii). Who were appointed by the Human Rights Commission which is a party, on a case by case basis without tenure and without legislative standards of appointment as a lay peoples' court established legislatively but who may

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[2] L. Harold Levinson, The Central Panel System; a Framework that Separates ALJs from Administrative Agencies. The Journal of American Judicature Society November 1981, Vol. 65, No. 5, p. 236, et seq.

have private knowledge of facts; (see Appendix No. 15, 20.)

.(iv). Who can be dismissed by the appointer but who can be disciplined only by no reappointment; (see Appendix No.22.)

.(v). Who are so interested, not disinterested, they volunteer and serve free; (see Appendix No. 20.)

.(vi). Who then have their compensation increased in this case very substantially during the pendency of this case befc[illegible] them; (see Appendix No. 21, effective July 25, 1977.), and

.(vii). Who do all this in disputes between two persons, while their appointor, the Washington State Human Rights Commission is serving as advocate for one. (see Appendix No. 15, 19.)

.(viii). Who make Findings of Fact with non-reviewable finality. (see Appendix No. 4.)

.(ix). Whose Findings of Fact cannot be

supplemented by additional evidence at the next court - the Superior Court level. (see Appendix No. 4, 11.)

The foregoing facts are established by the statutes and regulations under which this Petitioner was tried and decisions of the courts below. (see Appendix items as cited above and the Opinion of the Washington State Supreme Court in this case. Appendix No. 4 .)

Rule 21.1.(h) Federal Jurisdiction

This case involves the "due process" clause of the United States Constitution, Amendment 14 reading "...nor shall any state deprive any person of life, liberty or property without due process of law;". .(i). Complaint HRC No. P-41-47 was filed by the Washington State Human Rights Commission with the clerk thereof entitled: Betty P. Sellers, Complainant, v. Franklin County Sheriff's Office, Respon-

dent. It was dated January 26, 1977.

.(ii). Service was had by certified mail on Franklin County. A Tribunal to hear the case was appointed.

.(iii). Thereafter notice was given on March 30, 1977 by Franklin County by certified mail No. 028215 to said Commission stating the appointment and operation of the Tribunal was violative of Federal Constitutional due process. (see Appendix No. 23.)

.(iv). Respondent also answered in Affirmative Defense in Paragraph X of the Answer (p. 2)

> "That the tribunal is not lawfully or constitutionally constituted." (see Appendix No. 24.)

.(v). In a further responding answer, dated May 13, 1977, Respondent additionally stated in Paragraph A as follows:

> "A. That as previously stated the panel is not properly qualified since their oath and qualifications are calculated to favor the State

Board instead of administering even handed justice. A fair hearing cannot be had."

In this responding Answer previous affirmative defenses, including Paragraph X of the Answer above, were reaffirmed at page 2 . (see Appendix No. 25.)

.(vi). Trial was had before the Tribunal. Oral motions were made to dismiss on the ground that the Tribunal as constituted violated the Fourteenth Amendment due process. The motions were denied. (Record thereof is not available.) Respondent submitted proposed Findings of Fact and Conclusions of Law to the Tribunal. (see Appendix No. 26.) They propose as follows in Paragraph 27, page 4 , of these proposed Findings:

"27. The law and procedure under which this Tribunal was appointed and acted was unconstitutional under the due process and equal protection clauses, the separation of powers doctrine and the appearance of fairness doctrine of

the Washington State and United States Constitutions because the Human Rights Commission appointed and paid the tribunal which heard the case, assessed the penalty, took the complaint, investigated the complaint, made the charge, tried the case and enforces the law. The qualifications for membership in the Tribunal and the oath are likewise unconstitutional for the same reasons." (Appendix No.26.)

Paragraph 2 of the proposed Conclusions of Law, page 5 , proposed as follows:

"2. This tribunal is unlawfully and unconstitutionally constituted." (Appendix No. 26.)

These were not adopted.

.(vii). Instead the Tribunal ruled the question of constitutionality was beyond the scope of its authority and it must be presented to the Superior Court if appealed. (See Tribunal Opinion, Appendix No. 1 , p.7-9 .) They stated:

"The Tribunal having disposed of Respondents' contentions as to the Commission's failure to have followed administratively required procedures, and having granted the Commission's Motion for Partial

> Summary Judgment, the only remaining preliminary and non-substantive issues raised by Respondents are whether or not 'the Tribunal is lawfully or constitutionally constituted' and whether or not 'the Commission is attempting to proceed under rules it has not been granted authority to adopt.' See affirmative defenses in Respondent's Answer, numbered X and XI.
>
> "Although Respondents presented no evidence at the hearing in support of either of these two affirmative defenses, the Tribunal rules that these issues are beyond the scope of its authority in this proceeding. See Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255 at 257(1975); and Bare v. Gorton, 84 Wn.2d 380(1974). In the event that this decision of the Tribunal is appealed to Superior Court, such an argument could properly be raised at this time."

.(viii). On appeal to the Superior Court, the Franklin County Sheriff's Office submitted the same proposed findings as were submitted to the Tribunal and stated at page 2 in that presentation as follows:

"B. The Tribunal should have made the findings of fact in accordance with defendant's attached proposal consisting of thirty (30) findings. These are in accord with the evidence and the law. The proper findings are attached hereto. [Including Paragraph 27, supra., our page 18.] (see Appendix No. 27.)

Attorney for the Sheriff's Office urged the unconstitutionality. (Verbatim Report of Proceedings, p. 21-25.)

.(ix). The attorney for the Commission responded with argument and asserted

"The Hearing Tribunal was lawfully appointed." (Verbatim Report of Proceedings, page 53, et seq.)

.(x). A transcribed oral opinion of the Superior Court, at page 4, upheld the Constitutionality of the appointment of the Tribunal. (see Appendix 2.)

.(xi). Appeal was had to the Court of Appeals and federal due process unconstitutionality was assigned as Error #5. (Appendix No. 31.) and argued by counsel for the Sheriff's Office in brief at page 52-66 (not included in Appendix) and in oral argument, but ignored by the majority opinion of the Court. Otherwise the Court ruled in favor of the Franklin County Sheriff's Office.

.(xii). The Human Rights Commission appealed to the Washington State Supreme Court on the discrimination issue and

the Franklin County Sheriff's Office cross-appealed on the state and federal constitutional issues./ (Appendix No. 28.) Under Washington law, briefs in the Court of Appeals stand as submitted to the State Supreme Court on appeal. In a Court requested Brief (not included in Appendix) at p. 4-10,20-24, and in oral argument violation of federal due process was again urged. .(xiii). The Supreme Court of Washington in its Opinion 97 Wn.2d 317, 324-325, 329-334, 646 P.2d 113, at 116-117 and 119-121, held that the constitutional objections of the Franklin County Sheriff's Office were groundless and that the formation and actions of the Tribunal did not violate constitutional provisions of due process and separation of powers./ Mandate issued. (Appendix No.29.) Hence this application for certiorari. The federal question was timely and properly raised.

Rule 21.1.(i) Not applicable.

Rule 21.1.(j) Argument for Allowance of Writ Considering Rule 17.

The Washington State Supreme Court has decided important questions of federal constitutional law which has not been, but should be settled by the United States Supreme Court; and they decided it inconsistent with the trend of United States Supreme Court decisions. This fits Rule 17 requirements for acceptance.

The State Supreme Court below ruled that there was no federal constitutional objection under due process to: (1) agency appointed judges, (2) making Findings of Fact which are final and non-reviewable, (3) without allowing new evidence when appeal is taken to the Superior Court from these agency judges. Other objections were ignored

except the oath and the private litigation objection. See discussion in this case. Franklin County v. Sellers, 97 Wn.2d 317, at 324-325, 329-334; 646 P.2d 113 at pp. 116-117, 119-121.

The Washington State Supreme Court tried to soften their position by citing the New Washington statute appointing independent Judges in Washington. See Franklin County v. Sellers, 97 Wn.2d 317, footnote p. 331; 646 P.2d 113, footnote[3], p. 120.

In this case Franklin County was not protected by this new statute and neither are litigants before administrative agencies in forty-one (41) other

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[3]Brief of Professor Ivan C. Rutledge submitted Amicus Curiae to the Court of Appeals in this case sets forth the current status of the federal "due process" clause as it relates to administrative agency appointed Judges and this case.

states. Only Washington, California, Florida, Minnesota, New Jersey, Tennessee, Massachusetts, Colorado and Maine now (1981) have independently appointed Administrative Judges. See the entire volume of the Journal of the American Judicature Society, November 1981, Vol. 65, No. 5, discussing these matters, particularly Levinson, our footnote(2), supra, p. 14 .

Agency litigants in forty-one (41) states may need federal "due process of law" protection to obtain independent Judges which acceptance of this Petition may consider. The other nine (9) states might be provided with a federal "due process" underpinning for their statutes which presently are utterly repealable.

This is a federal "due process" idea of nationwide concern and application. Its time for consideration has come.

However this may be, we are not proposing this Court administer "general justice". It is the special facts of this case which are being constitutionally challenged and litigated here. If the United States Supreme Court proceeds on a case by case, fact by fact basis other states may gather some guidance as to the perview of the "due process" clause as it may relate to Administrative Judges. We urge acceptance of the Petition.

Submitted by mail this 15th day of October, 1982.

Respectfully submitted,

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BEFORE THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

BETTY P. SELLERS, Complainant, v- FRANKLIN COUNTY SHERIFF'S OFFICE, Respondent.	)	NO. P-41-74
	)	OPINION OF HEARING TRIBUNAL
	)	WSHRR, WD 260 1977

Appearances:

For the Commission:

G. Saxon Rodgers, Assistant Attorney General

For the Respondent:

George E. Heidlebaugh, Deputy Prosecuting Attorney, Franklin County, Washington

For Richard E. Boyles:[1]

Stanley Taylor of Peterson, Taylor, Day & Shea

The Hearing Tribunal

Ms. Mary Ann Ottinger, Chairperson

Professor Robert Aronson

Dr. J. Nelson Judy

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[1]While Mr. Taylor filed a Notice of

This matter, having come on for hearing before the above empaneled Tribunal, upon the Complaint of the Washington State Human Rights Commission on behalf of Betty P. Sellers, against the Franklin County Sheriff's Office, the Tribunal having considered all testimonial and documentary evidence, makes the following

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Appearance on behalf of Richard E. Boyles, individually, on October 6, 1977, and was present at the counsel table and conferred with counsel for the Respondent during the hearing, the Tribunal ruled at the outset of the hearing that Boyles was not individually a party to these proceedings, as the hearing would have proceeded as a matter of law, even in Boyles' absence (through death, resignation, loss of an election, etc.). However, because of Taylor's contention that Boyles felt his "personal integrity" was being attacked through this proceeding, Taylor was allowed to examine witnesses solely on issues relevant to Mr. Boyles' "personal integrity". He was not allowed to call any witnesses nor present any evidence of his own. This Tribunal finds that it has no authority to pass on the "personal integrity" of a witness not a party to this proceeding, and therefore that issue will not be discussed herein.

findings of fact.

FACTS

On or about June 21, 1974,[2] the Complainant, Betty P. Sellers, was referred to the Franklin County Sheriff's Office by Mr. Manuel G. Rodriguez of the Pasco Employment Security Office. Ms. Sellers was told by Mr. Rodriguez that there was an opening at the Sheriff's office for a Work Release Counselor for which Ms. Sellers would qualify, in Rodriguez' opinion. Rodriguez attempted to set up an interview appointment for Sellers by telephoning the Sheriff's Office, but he could not reach the proper party. He therefore told Sellers to call the Sheriff's Office herself

[2]There was some dispute in the testimony as to the exact date in June, 1974, on which Sellers sought to apply for the position in question. Sellers' testimony was that the date was June 21; other testimony indicated June 24; however, this exact date is irrelevant to the real issues in this case.

after about one o'clock p.m. that day and ask for Shirley Billingsley.

Sellers made this call about one o'clock p.m. that same day, indicating she had been referred by Rodriguez, and inquired of Billingsley about the Counselor position. Billingsley admitted that, in fact, there was a Counselor position available, but that they "wanted a man" to fill it. (There is no dispute in the record between Sellers and Billingsley as to the substance of this conversation.) When Sellers inquired as to the reason for this sex qualification, Billingsley replied that Sheriff Boyles (Richard E. Boyles) felt that they "needed a man".

Billingsley then invited Sellers to fill out an application for another kind of position which might become available in the future. Sellers did not go

down to the Sheriff's Office because she wanted the Counselor position, and she had already been told "they wanted a man."

Sellers subsequently filed a Complaint with the Washington State Human Rights Commission based upon this incident which she felt was in violation of RCW 49.60; and when the Commission investigated and made a finding that there was probable cause to believe sex discrimination in employment had taken place,[3] an attempt to eliminate the unfair practice by conference, conciliation and persuasion was made.[4] Failing this effort, a Complaint and subsequent

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[3]While Respondents argued that the Commission failed to comply with the requirements of RCW 49.60.240 because the results of the Commission staff's investigation were merely reduced to a "recommended" finding, and that the Commission itself never passed on the finding, the Tribunal finds that since the uncontroverted testimony of Craig Cole, Commission Clerk, that regular

Amended Complaint was filed and served on the Respondents, alleging that the Sheriff's Office had engaged in an unfair practice in violation of RCW 49.60.180(1), and a duly noted public hearing in accordance with the provisions of RCW 49.60.250 was held on October 13 and 14, 1977, in Pasco, Washington.

Commission procedures (as established in 1974) were adhered to in this case, and since no evidence was presented by Respondents to indicate that they had been prejudiced in any way by such a "recommended" finding, RCW 49.60.240 was complied with in this respect. In fact, Respondents' own Exhibit R-1, a series of letters passing between Respondents and representatives of the Commission, clearly indicate that there was no expectation of further and more binding action by the Commission -- short of public hearing.

[4]Respondents also contended that RCW 49.60.240 was not complied with in that conciliation provided for therein was "in form only but not in substance." While the Tribunal's ruling with respect to this issue will not be dealt with in depth in this Opinion, as the Commission was granted a partial summary judgment on this issue prior to the hearing, it

RCW 49.60.180(1) makes it an unlawful practice "to refuse to hire any person because of such person's ...sex ... unless based upon a bona fide occupational qualification...." It is the Commission's burden in this case to prove to the Tribunal that Complainant Betty Sellers' sex was a factor in her failure to be hired by Respondents and that no bona fide occupational qualification for the job in question existed at that time. See Section II, infra.

I.

The Tribunal having disposed of Respondents' contentions as to the Com-

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should be noted that RCW 49.60.240 does not contain language requiring "bona fide" or "good faith" efforts at conciliation. Further, even if Respondents felt the Commission's demands to be unreasonable, the conciliation effort would still not be one of "bad faith." See Johnson v. Skold, ___ Wn. Human Rts. Rptr. ___ (1977); and Whatcom County v. Langlie, 40 Wn.2d 855, 246 P.2d 836 (1952).

mission's failure to have followed administratively required procedures, and having granted the Commission's Motion for Partial Summary Judgment, the only remaining preliminary and non-substantive issues raised by Respondents are whether or not "the Tribunal is lawfully or constitutionally constituted" and whether or not "the Commission is attempting to proceed under rules it has not been granted authority to adopt." See affirmative defenses in Respondents' Answer, numbered X and XI.

Although Respondents presented no evidence at the hearing in support of either of these two affirmative defenses, the Tribunal rules that these issues are beyond the scope of its authority in this proceeding. See Yakima County Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255 at 257(1975); and Bare v.

Gorton, 84 Wn.2d 380 (1974). In the event that this decision of the Tribunal is appealed to Superior Court, such an argument could properly be raised at that time.

II.

In its landmark decision outlining the basic prerequisites of a prima facie case of employment discrimination in hiring, The United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), listed the following facts which must be shown by the complaining party:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[5]

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[5]While the Green case dealt with racial

This Tribunal holds that the Commission must be held to those standards of proof before Respondents' affirmative defenses may even be reached.

A. Availability of a Job

The testimony and documentary evidence presented reveals that the Franklin County Sheriff's Office had had a contractual arrangement with the Washington State Department of Employment Security between November 24, 1971 and August 18, 1972, whereby funds made available under the Federal Emergency Employment Act of 1971, 42 USC ss 4871-4883 (EEA), were granted to the Sheriff's Office for the purpose of hiring "one male counselor (advisor)" for the Sheriff's Work

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discrimination, these same standards for a prima facie case have been held applicable to sex discrimination cases, as well. See Dothard v. Rawlinson, ___ U.S. ___, 15 FEP Cases 10 (U.S. Sup. Ct., June 27, 1977).

Release Program. See Exhibit C-7. Such an individual (male) was hired.

In January, 1972, Shirley Billingsley (a female) was hired by the Sheriff's Office as a counselor in the Work Release Program. On April 21, 1972, a revised contract was entered into between the Employment Security Department and the Sheriff's Office for funding for three positions, including a Director for the Work Release Program and a "Male Counselor." See Exhibit C-8. This contract was still due to terminate August 18, 1972.

Further, on November 26, 1971, a third agreement was entered into between the above named parties providing EEA funding for a "Female Counselor" position for the Sheriff's Office. This funding was to run from December 1, 1971 through October 28, 1972. See Exhibit

C-9. Presumably it was this position which Shirley Billingsley filled, and when funding was made available for a Work Release Director (See Exhibit (-8), Ms. Billingsley moved into that position but continued to perform "counseling" duties along with the "male counselors." Subsequently, both male counselors terminated their County employment leaving Billingsley as the sole counselor in the Work Release Program.

The above agreements were extended numerous times, finally ending in a termination date of May 31, 1973 for one agreement (See Exhibit C-10) and March 31, 1974 for the other. (See Exhibit (C-11).[6]

According to the uncontroverted testimony of Manuel Rodriguez of the

[6]The testimony and documentary evidence relative to the relationship between the above numbered contracts and the job po-

State Employment Security Department, on March 31, 1974, the EEA Program was superceded by the Federal Comprehensive Employment and Training Act of 1973, 29 USC ss. 801 et seq. (CETA). However, because the Franklin County Sheriff's Office had not fully expended EEA funds authorized under previous agreements, a short-term contract (from June 1 through

sitions available is extremely conflicting. Because even the parties involved -- i.e., Shirley Billingsley -- could not testify as to the exact dates of employment, the Tribunal was unable to relate specific contracts to specific employees. However, we find that for purposes of this decision, it is sufficient to note only that Respondents had a past practice of hiring counselors (both male and female) through EEA funding, and that during some periods of time, Shirley Billingsley was the only Work Release Counselor in the Sheriff's Office. The Tribunal also notes that at least until March 31, 1974, counselors were designated "male" and "female". Also, Shirley Billingsley was, at some point, "absorbed" into the regular County payroll and her employment continues in that manner to date.

August 15, 1974) was entered into between the County and the Employment Security Department to use up these funds for a "counselor" position. See Exhibit C-12[7]

A job order was drawn up by Rodriguez on June 3, 1974 for the "counselor" position, consistent with his usual practice with EEA funded positions. This job order contained the qualifications

[7]While Respondents argued throughout the hearing that this contract, identified as Exhibit C-12, was never authorized by the Sheriff and, in fact, had never been seen by him until shortly before the hearing, the Tribunal finds the testimony of County Commissioner Bruce D. Whitemarsh, signator to the agreement, to be most credible on this point. He testified, in effect, that he would not have signed the contract (C-12) on behalf of the County if he had not been requested to do so by the Sheriff, as his (Whitemarsh's) responsibility did not include expending funds, but getting them into the budget. Further, the Sheriff's own testimony was that he recalled discussing with the County Commissioners the possibiltiy of EEA or CETA funds for a counselor position prior to Sellers' Complaint, June 24, 1974. See Exhibit R-4.

specified by the Sheriff's Office[8] for the vacant position, but did not include any reference to a preference for male applicants. See Exhibit C-13. Rodriguez and Sellers testified that it was for this position that she was referred to Shirley Billingsley. Sheriff Boyles subsequently acknowledged not only the availability of the counselor position, but its relationship to the unexpended EEA funds in his letter to the Washington State Human Rights Commission investigator, Velma Jefferson, dated July 11, 1974. See Exhibit C-22. The contents of this letter clearly defeat any argu-

[8]Rodrigues was unclear in his testimony as to whether he received specific qualifications from the Sheriff himself or Billingsley. In light of the Sheriff's own testimony that he discussed with Billingsley the qualifications for the counselor position, including the requirement that the employee be male, the Tribunal finds that even if Billingsley provided Rodriguez with the qualifications, she was acting as an agent of Sheriff Boyles.

ment Respondents could make about the non-availability of this position. We believe the contents of this letter to be so conclusory on this point that they deserve to be recited below:

"July 11, 1974

"Mr [sic] Velma J. Jefferson, Investigator, Wn. State Human Rights Commission, 112 South Fourth Avenue - Room 7, Pasco, Washington 99301

Dear Sir: [sic]

Our Work Release Section consists of one person at this time, a female. We originally had three employees, one female and two males, but found our load was not heavy enough to warrant three employees. We let one male employee go and then later the second employee found other employment leaving just the female to operate this department. Just recently E.E.A. provided funds enabling this department to hire one more employee for this section. It is my feeling that this employee should be a male since there are times that a male cannot communicate with a person of the opposite gender, and that the male prisoners on work release are much greater than the amount of females we have on work release.

When the funds became available for this opening, I instructed the Work

Release Director to screen all male applicants leaving the final decision to myself as to who would be hired. I, at this time, still feel this position should be filled by a male counselor.

If you have any further questions please feel free to call on me.
Sincerely,

Richard E. Boyles, Sheriff

REB/rts"

B. Application and Threshold Refusal

The testimony of Sellers, Rodriguez and Billingsley was clear that Sellers did, in fact, attempt to apply for the Work Release Counselor position on or about June 21, 1974. The fact that she failed to either fill out an application form or appear for an interview is irrelevant in light of case law holding that a threshold refusal to consider for hiring, because of sex, constitutes an unfair practice within the meaning of RCW 49.60.180(1). The case of Arnette v. Seattle General Hospital, 65 Wn.2d 22 (1964), is but one example of many

situations where individuals of one protected class or another are told, in effect, not to "bother" to apply because they are the wrong sex, race, age, etc. Betty Sellers' attempts to obtain the counselor position in question here went as far toward that end as would be reasonable, and the Tribunal finds that any further effort on her part would have been futile. The law does not require futile efforts.

C. Qualifications

Having established that Complainant Sellers did, in fact, attempt to apply for a position that was available, we must now consider whether the Commission has met its burden of proving that Sellers had the qualifications for the position at that time.

The Tribunal looks to several sources of evidence for the necessary qualifica-

tions for this counselor position: (1) The qualifications of Shirley Billingsley herself; (2) the qualifications of others who had filled the position in the past; (3) the Sheriff's own expectations for this position; and (4) the opinions of others who worked with Shirley Billingsley and previous counselors in the Work Release Program.

Because Shirley Billingsley was, and continues to be, the sole Work Release Counselor in the Franklin County Sheriff's Office, as well as its Director, and because not a scintilla of adverse evidence as to her abilities or job performance was heard by the Tribunal, we look first and foremost to her as an example of the type of counselor being sought. With the exception of a preference for a male, which will be dealt with below, even the Sheriff him-

self, having the ultimate power to hire, testified Billingsley continues to do "an excellent job." Boyles did, however, testify that in June, 1974, he wanted to "upgrade the general qualifications" of the counselors and hoped to find someone with either a "psychology or social education background."[9]

Billingsley attended three different colleges and universities, but never attained a degree before her counseling job in the Sheriff's Office, and is still working on her Associate of Arts Degree. Sellers, on the other hand, has a Bachelor's Degree in Sociology and Psychology and is close to completion of a Master's program in Guidance and Counseling.

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[9]The Tribunal noted that when asked to describe the qualifications of the males who had previously filled the counseling positions, Boyles could not recall, and yet these were the male counselors he felt had effectively supplemented the work of Shirley Billingsley in Work Release counseling.

Billingsley worked as a legal and executive secretary prior to her Sheriff's Office job and had no previous counseling experience. Sellers has had many years of teaching and counseling experience, including work with migrant workers in the Pasco area and some teaching experience with work release inmates.

Respondents called Chuck Pierson to testify in their behalf, and his testimony, while credible to the Tribunal, only served to emphasize that Betty Sellers was, at the time of her attempted application, well qualified to be a Work Release Counselor in Franklin County. Pierson had held such a position himself and had worked with Shirley Billingsley. In fact, Pierson testified that because of Billingsley's lack of counseling experience, the Mid-Columbia Mental Health Center had been providing those services

to the inmates of the Franklin County Jail on Work Release.

Finally, the Tribunal notes that witnesses who were called by Respondents (presumably to support their bona fide occupational qualification defense discussed below) each had praise for the abilities and performance of Billingsley, in spite of her lack of education and experience.[10]

The Tribunal concludes, therefore, that not only was there a position available in the Franklin County Sheriff's Office for which Complainant attempted to apply, but it was further one for which she would have been qualified if she had not been presented with a thres-

[10] See testimony of Lawrence S. Moore, Chief Deputy Prosecuting Attorney, Franklin County; C.J. Rabideau, Assistant Prosecuting Attorney, Franklin County; Judge Richard G. Patrick, Franklin County Superior Court judge; Dr. William D. Sherman, M.D., Mid-Columbia Mental Health Center.

hold disqualification based on her sex.

D. Refusal to Hire

The testimony is uncontroverted that Sellers was, in fact, refused the opportunity to apply for the available counselor position, and the written statement of Shirley Billingsley, Exhibit C-6, documents this fact.[11]

Ms. Sellers' sex was the only reason given for this threshold refusal, and even at the hearing, Respondents presented no other factors for her rejection.

E. Subsequent Hiring

While the testimony of all knowledgeable witnesses was that no one (male or female) has subsequently been hired to

[11] This exhibit states in part, "Ms. Sellers requested an interview for this position and I informed her at that time that the need was for a male counselor."

fill the counselor position in question, Sheriff Boyles testified that the only reason for this was the filing of Ms. Sellers' Complaint. In fact, he testified that Ms. Billingsley "could use more employees" in her program. Therefore, this is not a case where subsequent to the alleged discriminatory incident, the job ceased to be available. In point of fact, another CETA contract for the counselor position was entered into on September 3, 1974, and was scheduled to provide funding for this position for another ten and one half months. See Exhibit C-18.

So while Respondents may not have continued to seek applicants for the counseling position after rejecting Sellers,[12] they gave every indication

[12]There is some indication that they did, however, in that Ms. Billingsley recalled at least one male applicant subsequent to the refusal to consider Sellers for the position.

of intending to, as soon as the present matter was resolved. The letter dated December 31, 1974 of Sheriff Boyles to Rodriguez "releasing" these CETA funds for the counselor position came only after the Sheriff satisfied himself that Sellers' Complaint relative to the position still presented a problem to him. See Exhibit C-23. Finally, Respondents entered into a "renewed and revised" agreement dated March 18, 1975 to extend financing for the position through June 18, 1975, but changing the nature of the funded position to "contract, clerk, auto." See Exhibit C-19. While the Tribunal takes cognizance of the fact that Boyles denied any knowledge of either the September or March contracts, we find the sequence of events with respect to these contracts more than coincidental, and hold that the most reason-

able finding supports the assertions of the Commission that the Sheriff's Office continued its contractual arrangement for EEA and CETA funding so as not to lose that "working relationship."[13] The funding would most probably have continued and been used to salary a work release counselor until at least June 18, 1975, but for Betty Sellers' Complaint. The Tribunal therefore finds that simply because Respondents' discriminatory practices may have been tolled while this Complaint was pending, the Commission's prima facie case will not be defeated, unless Respondents could show an intent to change their practices. No such evidence appearing, we find the Commission's prima facie case complete.

The Tribunal thus has no choice but

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[13] See Sheriff Boyles' letter to Rodriguez (Exhibit C-23) indicating a view toward "a continuing working relationship in the new year." [1975].

to conclude that an unfair practice in violation of RCW 49.60.180(1) occurred, and so long as the Commission can prove that Sellers was damaged thereby, a prima facie case has been made and the Tribunal may now reach the affirmative defenses raised by Respondents to justify their actions.[14]

III.

While Respondents presented evidence attempting to disprove each of the elements of the Commission's prima facie case, it was apparent that the real thrust of Respondents' case rested on evidence of an alleged bona fide occupational qualification (BFOQ) exception to RCW 49.60.180(1) for the counseling

[14] While Respondents raised the issue of respondent superior in their Answer, no evidence was presented at the hearing on that defense, and the Tribunal finds that Shirley Billingsley acted as an agent of, and upon the express instructions of, Sheriff Boyles, when she rejected Ms. Sellers.

position in question. While such an argument (BFOQ) acknowledges that Sellers' hiring did not take place because of her sex, Respondent is still not precluded from making such seemingly contrary arguments.[15] However, Respondents are bound to prove such an exception by a preponderance of the evidence. Weeks v. Southern Bell, 408 F.2d 228 at 232 (5th Cir. 1969); Haslund v. Seattle, 86 Wn.2d 607, 547 P.2d 1221 (1976); Opinski v. Clements, 73 Wn.2d 944, 442 P.2d 260 (1968).

Dothard v. Rawlinson, __ U.S. __, 15 FEP Cases 10 (U.S. Sup. Ct., June 27,

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[15] It should be noted here that while the Tribunal members spent considerable energy during the hearing attempting to hear all the facts relevant to the Complaint, the offensive and disrespectful conduct of counsel for the Respondents, often directed at the Tribunal itself, made it extremely difficult for the Tribunal to decipher what the true thrust of Respondents' case really was.

1977),[16] most recently delineating the limits of the BFOQ exception, held that it was to be extremely narrowly applied, but cited therein the Weeks case, supra, which most clearly spells out the employer's "rule of thumb" for application of a BFOQ to a particular job:

> "We conclude that the principle of non-discrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." (Emphasis added.)

Respondents here argue not that "all

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[16] Section 703(e) of the 1964 Civil Rights Act (42 USC sec. 2000e, et. seq.), sets forth the BFOQ exception in the federal statute in language similar to that used in RCW 49.60.180(1). WAC 162-30-010 provides that, in the interest of consistency, and to avoid confusion on the part of persons governed by both state and federal sex dixcrimination laws, interpretations of the comparable federal law will generally be followed by the State.

or substantially all women would be unable to perform safely and efficiently the duties" of a Work Release Counselor. On the contrary, they praise the efforts of one woman who had handled the job singlehandedly for in excess of four years. Their argument is simply that it is the belief of the Sheriff that if he has two counselor positions available, it would be "better" to have one male and one female. Thus, having already employed one female (Shirley Billingsley) and having one more vacancy, he should be entitled to hire a man and turn down all female applicants on this principle.

Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971) makes clear the fallacy in this argument, however. In that case, the court made the distinction between "necessity" and "convenience." If hiring a male for the one vacant counselor position was a

necessity to the Work Release Program, the law would probably sanction this practice as a BFOQ. But since it has been proven that a woman is not only capable of handling the job, but can handle it quite effectively, hiring a man for the second position -- to the exclusion of all females, no matter how qualified -- becomes a mere preference or convenience.

Similar areas of preference or convenience were pointed out by Respondents' witness Chuck Pierson, who testified that in his experience as a counselor, not only do some inmates on Work Release relate better to one sex or the other, but also to one race or the other, different age groups, counselors with differing dress and grooming habits, etc. It is thus clear to the Tribunal that a BFOQ exception to the discrimination

statute is not warranted where there is no evidence that women as a class cannot perform the functions of a counselor. A preference by the Sheriff for "one of each" becomes faulty reasoning when held to the standard of RCW 49.60.[17]

This reasoning becomes even more invalid when the qualifications of Betty Sellers for the job in question are considered. By the standards described by the Sheriff himself, a better qualified applicant would have been difficult to find.

IV.

Complainant testified that she did not obtain other employment immediately after her threshold rejection by Respondents. She therefore has been damaged to some extent by Respondents' viola-

[17] While the Tribunal feels very strongly about striking down the BFOQ defense in this case, it also noted carefully the "strong opinions" of individuals

tion of RCW 49.60.180(1). The extent of her damages is a far more complex question and will be dealt with below in the Tribunal's fashioning of a remedy.

CONCLUSION

In conclusion, the Tribunal finds that (1) the Respondent Franklin County Sheriff's Office violated RCW 49.60.180(1) by refusing to give Complainant Betty P. Sellers the opportunity to apply for the position of Work Release

such as Dr. Sherman, Mr. Pierson, Ms. Billingsley, and others who work closely with the Work Release Program, that it may be desirable to employ a counselor of each sex, if possible. However, the Tribunal fails to see the relevancy of the cliche' used by counsel for the Respondents that "it's nice to have a man around the house," as the above witnesses all testified that male counselors are available to the Franklin County Jail through the Mid-Columbia Mental Health Center on a regular basis. Further, all of Respondents' witnesses but Dr. Sherman conceded that a well-qualified female would be preferable to a less-qualified male, and that, therefore, Ms. Sellers' application should have been accepted, in case she turned out to be the best qualified for the position, despite the Sheriff's preference for a male.

Counselor because of her sex; and (2) neither the BFOQ nor any other affirmative defense is supported by the evidence.

REMEDY

The Tribunal is particularly guided by the principles set out in WAC 162-08-298(9) in fashioning a remedy for the unfair practice committed by Respondents:

> "The guiding principle for the Tribunal is whether a particular remedy will effectuate the purposes of the law against discrimination."

Thus, even an award of back pay to Complainant is not so much a private award of damages, as it is a "public reparation order." WAC 162-08-298(9).

But the Tribunal in this case is singularly impressed with its responsibility to see that the Respondents do not continue to utilize employment practices which have the effect of excluding women as a class from certain jobs. The

fact that the Tribunal has found that a preference for one counselor of each sex does not rise to the level of a legal definition for a BFOQ verifies the need for a cease and desist order relevant to practices specifically predicated on this manner of thinking.

1. The Tribunal therefore orders the Respondents to cease and desist from refusing to hire Complainant Betty Sellers or any other woman for work release counseling or any similar positions, even if Respondents deem it preferable to have one counselor of each sex, unless subsequent to this opinion, such position is declared by the Commission to have BFOQ status pursuant to WAC 162-16-020, -030, and -040, under the procedures of WAC 162-08-700.

2. With respect to the Complainant Betty Sellers individually, the Tribunal has found that she was unlawfully refused

the opportunity to apply for a Work Release Counselor position available through EEA funding on June 21, 1974. The testimony and documentary evidence show that this position would have been continuously available at a monthly salary of $600 from the above date until at least June 18, 1975, the termination date of the last CETA contract with Respondents.[18] While Shirley Billingsley's testimony that her own position which began as an EEA funded position, was eventually absorbed into the regular Sheriff's Office budget, and she remains employed on that basis yet today, the Tribunal finds that it would be pure speculation to conclude that Betty Sellers would have remained employed beyond June 18, 1975. While

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[18]The Tribunal has found that but for the Complaint of Betty Sellers, this final contract, running from March 18 through June 18, 1975, would have funded a counselor position, instead of the "contract, clerk, auto" position.

the Tribunal is cognizant of the testimony of both Billingsley and Sheriff Boyles that a second counselor is needed in the Work Release Program yet today, there was no testimony to support a finding that the Sheriff's Office would fund such a position without the availability of CETA funds. Absent that testimony, the Tribunal orders that Respondents pay to Betty Sellers the total sum of $7,200 in back pay, representing wages she would have earned at the rate of $600 per month from June 21, 1974 through June 18, 1975. Any and all benefits incident to such employment shall also be paid to Sellers for the above period.

3. Further, the Tribunal orders Respondents to offer to hire Betty Sellers for the first available work release counseling position, or any similar position, whether the job is funded through CETA monies, the regular County

budget, or through any other means. Sellers shall be given notice of said offer by registered mail, copy to the Washington State Human Rights Commission, 1601 Second Avenue Building, Seattle, Washington, 98101, and she shall have ten days in which to either accept or reject the Respondents' offer in the same manner. In the event that Sellers refuses to accept Respondents' first offer of employment, she shall be similarly notified of all future vacancies for such positions, and be given the right of first refusal for such positions for a period of two years from the date of this Opinion. Copies of said notifications shall also be mailed to the Commission. Sellers shall have ten days in which to either accept or reject these positions as well.

4. Any position which Betty Sellers chooses to reject shall be advertised

in a local publication of daily or weekly circulation and through the Pasco Office of the Employment Security Department. Applicants shall be considered without regard to sex or any other protected classification defined under RCW 49.60.180, and the Commission shall be promptly notified of the name, address and sex of each individual hired.

5. Respondents shall have thirty days from the entry of this order to submit to the Commission written criteria for the evaluation of applicants for work release counseling (or similar) positions. The Commission shall have ten days thereafter within which to file objections with this Tribunal regarding said proposed criteria. If no objection is made, the Tribunal will approve entry of an order implementing such criteria. If counsel for the Commission

object to the proposed criteria, this Tribunal will promptly hold a hearing and rule on the adequacy thereof.

Jurisdiction of the above entitled matter shall be retained by the Tribunal until the above remedies have been implemented.

In the event that the functions of the Franklin County Work Release Program are transferred from the Sheriff's Office to some other County department, the terms of the above order shall apply to that department.

Dated this 28th day of November, 1977.

s/Mary Ann Ottinger
Ms. Mary Ann Ottinger,
Chairperson
s/ Robert Aronson
Professor Robert Aronson
s/ J. Nelson Judy
Dr. J. Nelson Judy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF FRANKLIN

FRANKLIN COUNTY SHERIFF'S OFFICE,	)	No. 23165
Petitioner,	)	
-VS-	)	
BETTY P. SELLERS, Complainant, WASHINGTON STATE HUMAN RIGHTS COMMISSION,	)	
Respondent,	)	
-VS-	)	
FRANKLIN COUNTY SHERIFF RICHARD E. BOYLES,	)	
Intervenor.	)	

Proceedings had before the HONORABLE WALTER A. STAUFFACHER, visiting Superior Court Judge from the County of Yakima, in and for the County of Franklin, on October 6, 1978, at Pasco, Washington.

ORAL OPINION OF THE COURT

THE COURT: Good morning everyone.

I must apologize, I think, for being so long as I have in getting back to give

you this opinion. There have been a lot of things that have occurred in the meantime such as a first degree murder case and a two week products liability case and a few other things kind of like that.

This will be a little bit disjointed. I have some outlines of what I am going to say, but I don't have it written out, so it might be a little bit disjointed as we go along.

I might indicate to you that I went over this matter as thoroughly as I possibly could. I first read the briefs of counsel and their authorities, and I did some -- also did some other looking, and I will refer to some cases which were not cited, but I have read everything at least twice, the entire bundle, that pile, the testimony and all of the exhibits and everything else. I thought that I needed to, and as I indicated, I read the briefs, read the authorities,

then went through all the testimony and exhibits and went back and did it over again just to be sure that I was not missing something somewhere along the line.

Now, to sort of lay the groundwork here, the rules for the review of tribunal findings and orders should perhaps be set out. Cited to me has been this Milwaukee Railroad case in 87 W 2d 802 where there are three particular holdings in that case. The first was that the word "handicap" was not unconstitutionally vague, and that doesn't apply to this case. Second was the appearance of fairness doctrine applies to tribunal members, and that was raised as far as this case is concerned, and the third was that the general policies and guidelines for selecting tribunal members are rules which require formal adoption. That was not raised as far as this case is

concerned.

However, that case does recognize that, and quoting from it,

> "There appears to be no question that the Commission is an 'agency' within the Administrative Procedure Act.",

and so we have to follow the Administrative Procedure Act in terms of how this Court would view this particular case.

So turning to the Administrative Procedure Act, it indicates that review should be conducted by the Court without a jury, which, of course, followed, and shall be confined to the record, which I previously had ruled upon.

Now, going into what the guidelines for the Court are, it indicates in RCW 34.04.130(6) that:

> "The Court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:",

and then it lists subsections. The last three are basically what apply to this case. They are that they are affected by other error of law, or are clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order, or they are arbitrary and capricious. I will get into the definitions of those particular terms later as they apply to this case.

Let me address myself to the first three where the Court may take those particular actions.

One, whether or not this particular situation is in violation of any constitutional provisions.

Now, there were claims that there was some unconstitutionality as far as this matter was concerned. One was in

terms of the selection of the tribunal members, and the other dealt with the oath. Now, there was no constitutional provision cited to the Court that any of these statutes, and it was statute 49.60.250 which sets out the selection, the method of selection and the qualifications of the tribunal members. It specifies who the members shall be. They shall not be members of the Commission who or anyone who has been previously connected with the case and things of that nature. There is no provision of the constitution which has been cited to the Court or any cases for that matter which indicate that there is an unconstitutional selection as far as the tribunal members are concerned.

With respect to the matter of the oath which is prescribed by the Washington Administrative Code, the Court again can find nothing unconstitutional

as far as the oath is concerned. Nowhere in the constitution of either the United States or the State of Washington am I familiar with that prescription, a particular method of oath.

Now, it has been claimed that the only oath that is required is that they would uphold the laws of the State of Washington and the United States. That is contained within this particular oath. Here it prescribed, the oath prescribed requires that they sign under oath themselves that they would be impartial as far as the proceedings are concerned; that they will view the matter in all fairness, and that they will adhere to the laws of the State of Washington regarding discrimination. This certainly doesn't violate the constitution.

There are many different types of oaths of all kinds that are administered

to all kinds of people. I think of the oath that is given medical doctors, the Hippocratic oath. I think of the oath of attorneys which is -- you take one of these legal sheets, and the oath for attorneys when they are sworn into the bar at least that long and contains so many other things other than just a promise to uphold the laws of the State of Washington and the United States that if we follow the argument of counsel, it would in and of itself be unconstitutional.

But I find that there is no violation of any constitutional provisions.

So then we pass on to the second area where the Court is operating within these guidelines, and that is that they operated, the tribunal, operated in excess of the statutory authority or jurisdiction of the agency.

Now, in connection with the parti-

cular subsection, we need only look to the statutes themselves. The statutes clearly set out the jurisdiction of the agency. They clearly spell out the authority and the procedure to be followed in terms of processing any complaint that comes before it, that comes before the Commission. They authorize and set these out with particularity and for that we need only look to RCW 49.60.180. I am not sure that I -- yes, I did. That is the particular statute which applies most particularly to this case in which it states, and quoting:

> "It is an unfair practice for any employer: (1) To refuse to hire any person because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification:"

Now, they set that out with particularity, and under that, it comes specifically -- they specifically placed

this under the jurisdiction of the agency, and there was nothing done by the agency, the Commission or the tribunal which was in excess of what was spelled out specifically in statute, so I find that there is nothing there that was done that was in excess of statutory authority or the jurisdiction of the agency.

Going to the third, that the administrative findings or conclusions and so forth are made upon unlawful procedure.

Again, we need only to look at the statutes because they spell out again with a good deal of particularity what the procedure shall be in terms of a complaint filed before the Commission.

First the Commission must investigate the matter and make findings. Now, there was some contention that no findings were made by the Commission because

the investigator put it in the language that there was a recommendation that a discriminatory practice -- that the Commission had found that there was a discriminatory practice that had been made. I think that is a matter of pure semantics because there is no question that the Commission adopted that recommendation as a finding and made it a finding by their action.

After that has been done, of course, then you go into the conciliation process which did not work in this particular situation and really has nothing to do with the case, and then it goes before the Commission. The statute then very clearly says the Commission does not hear this. We set it aside to a particular tribunal. The qualifications and requirements for the tribunal members are set out in the statute, and so this total procedure that has been followed

as far as this case is not an unlawful procedure. It is set forth with great particularity by the legislature in the statutes, and because there is a separation there between the Commission and the tribunal members, and because the oath that they are required to take and the qualifications that are set forth in the statute for them, I don't find any evidence in this case of any kind of any violation of the appearance of fairness doctrine.

All right. Let's then turn to the last three areas of guidelines for this Court.

First is whether or not the administrative findings and conclusions and decisions are affected by error of law, are clearly erroneous, or are arbitrary and capricious.

Again, we need to look at the law to determine what it was that raised

the complaint in this particular situation. Again, paraphrasing the statute which is 49.60.180, it was brought under this statute that it is an unfair practice for any employer to refuse to hire any person because of such person's sex, unless based upon a bona fide occupational qualification.

Reference has also been made to Article XXXI of the Washington State Constitution wherein Section 1 states:

> "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.",

and Section 2 of that Article XXXI,

> "The legislature shall have the power to enforce, by appropriate legislation, the provisions of appropriate legislation, the provisions of this Article."

Now, this is Article XXXI, commonly known as the Equal Rights Amendment, which was a referendum by the legislature to the people of the State. It was passed

and approved on November 7 of 1972, a couple of years before this particular situation arose. It is in the news right at the moment. As I came into town this morning and listened to my car radio, I see that the Senate passed and extended the time for amending the U.S. Constitution for another 39 months which does not require the President's signature, which I didn't know, but apparently it does not.

In any event, it appears that as far as the will of the people of the State of Washington is concerned that this Equal Rights Amendment should apply to all the people of the State of Washington.

Now, that is the basic framework of the law under which this complaint was brought.

I think perhaps we ought to explain these terms a little bit in terms of

what "other error of law" means, what "clearly erroneous" means, and what "arbitrary and capricious" means.

The matter of Albertson's v. Human Rights Commission, 14 Wash App 697, indicates that -- tells us what "other error of law" means. In that particular case, a young man had brought a discrimination suit on the grounds that he was required to particularly cut his hair while the female employees were not, and the case held that the company regulations regarding the length of male hair was not sex discrimination within the statute. In terms of error of law, they indicated that discrimination is deprivation of an equal opportunity because of an immutable sex classification. This is what they are talking about in terms of as far as the law is concerned, whether there was a violation or an error of law in terms of this.

So they defined discrimination in that case as deprivation of equal opportunity because of an immutable sex classification, not something that can be -- What they mean by immutable is the physical characteristics of individuals and not the things that can be done by cutting of hair or shaving or whatever.

In terms of what "clearly erroneous" means, the case of Department of Ecology v. Ballard Elks, 84 W 2d 551, gives us this language, and I am quoting from it:

> "To reach a conclusion that a decision or order of an administrative tribunal . . . is 'clearly erroneous' within the purview of" the statute, "the reviewing court must, based upon the record before it, be firmly convinced that a mistake has been committed, even though there be evidence supporting the decision or order. In the course of judicial review, due deference must be given to the specialized knowledge and expertise of the administrative agency. The reviewing court cannot simply substitute its judgment for that of the agency."

This was further explained in The

Department of Ecology v Kirkland, as 8 Wash App 576. The Court there indicated that:

> "Indeed, the test requires that the reviewing Court evaluate the entire record -- not merely the findings or conclusions -- to determine whether or not,"

and this is the test,

> "After such review, the Court is left with the definite, and firm conviction that a mistake has been committed by the administrative agency."

If we turn to the test as far as "arbitrary and capricious" is concerned, that test is set out in Wigmosta v. Seattle, 8 Wash App 681, wherein they state that:

> "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of facts of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."

So those are the three tests that

we are going to be applying and looking at as far as this case is concerned. I should explain that we have to again look at the statutes a little bit as far as the "clearly erroneous" test is concerned because there are two prongs to it. One, it says that the administrative findings, conclusions and decisions are clearly erroneous in view of the entire record as submitted, which I have just defined through the Ballard Elks case, but the second prong to it is, and the public policy contained in the act of the legislature authorizes the decision or order. In other words, it has to be clearly erroneous in view of the public policy. Again, we have to look to the statute with respect to this particular case which is 49.60, and under .010 of that section, it states that, and here is the policy as given by the State:

> "The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state."

In the next subsection, they indicate that:

> "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."

So we have to look at that also, of course, in terms of the "clearly erroneous" test.

Now, I don't think that I will unduly prolong this decision by rehashing the entire testimony as far as this matter is concerned. I looked over all of the assignments of error that were raised by counsel and this, in a sense, was why I went back and reread all of the testimony again from cover to cover. There is some -- I don't know, something like

400 pages of it. It winds up right on page 400, because I thought I might be missing something. I read it once and looked again at the assignments of error, and I can't quite reconcile myself to the assignments of error as related to the testimony that was produced at the hearing. It just somehow or other didn't match, so I went back and reread everything as far as the testimony and exhibits were concerned so that I would be sure that I just wasn't missing something.

To summarize, as far as the factual situations are concerned and the testimoney is concerned in this matter, there is no question in this Court's mind that there was a job opening in the sheriff's office at the time that this incident occurred in June of 1974. Several things, including exhibits, bear this out. First off, there had been apparently previous

discussion that the EEA and CETA funds were going to become available. A request undoubtedly had to be made to the Employment Security Department for them to receive the qualifications which are contained in Exhibit C-13 to the effect that there was a counselor position open; the person to see was Mrs. Billingsley; the pay scale was set; the qualifications in terms of one year's experience in counseling or social work; of course, working with inmates in jail or work release people. It indicates that the work hours were flexible, and must have been unemployed for at least 30 days and been a resident of Franklin County. Those are the qualifications for the job opening with a request to send applicants to the Franklin County Sheriff's Office where they were to contact Ms. Billingsley.

I think it is further acknowledged

by the sheriff that there was an opening here and that he knew that this was a position that was available.

Now, I recognize the argument that we didn't know that the contract had been signed. That is a ministerial act. There is no question in my mind that it was known that the funds were going to be available through EEA and CETA; that it was indicated to the Employment Security Department, "Go ahead and process it and send us applicants for the position," and once it was indicated that those funds were available, it was merely a ministerial act of signing the contract, and it just is unreasonable -- it is just unreasonable to conclude that it was not known that there was an opening and that we were going to fill it, and I find further in Exhibit C-22 which is the letter of July 11 of 1974, written by the sheriff to the effect that, quot-

ing, "When the funds became available for this opening, I instructed the work release director to screen all male applicants, leaving the final decision to myself as to who would be hired. I at this time still feel this position should be filled by a male counselor." Now, there is no question that that clearly indicates that it was when the funds became available that the Employment Security Department was advised under Exhibit C-13 that there was a job order, EEA job order here, and to please send us applicants for this job.

So I find that there is actually no question whatsoever that there was a job opening.

There is also no question whatsoever that Ms. Sellers was referred to the sheriff's office to apply for that job. This is acknowledged in Exhibit C-6 by the statement of Ms. Billingsley

who acknowledged, and all the testimony is uncontroverted on this, they both testified exactly to the same things, very, very frankly and very truthfully, that a call was made; that Ms. Sellers indicated that she was available for that job and wished -- for the counselor position, and wished to come down and put in an application; that she was told that the position was for a male counselor; that she could come down and put in an application for other positions which might open in the future in another position of some sort. Nobody questions that Ms. Billingsley, I mean -- excuse me, Ms. Sellers was referred and that the call was made to Ms. Billingsley. No question that Ms. Sellers was told that the job was for a male position, and it really is, I think, a little bit just kind of argumentative to say that well, there wasn't any discrimination because no

application was actually filed. The law doesn't require someone to do a useless act, and there was no need -- there is no question in this case that there was no need for Ms. Sellers to go any further. She had been told, in effect, and quoting from what Ms. Billingsley said, "Miss Sellers requested an interview for this position, and I informed her at that time that the need was for a male counselor. I informed Miss Sellers that she was welcome to come to the office and fill out an application which would be reviewed if an application for probation subsidy program was accepted by the state. I explained to her that at that time there would be an opening for a female counselor and her application would be reviewed.

Well, this indicates that there is no need to go any further and come down

and file an application for the particular job that was then open at that time. What they were saying is that we are not going to consider you for this job, but you can put in an application and if something comes up in the future, why then we will perhaps consider you.

So the law doesn't require going through the department of useless activities in coming down and actually filing an application for a job that she had already been advised that she would not receive consideration on, and when you put this all together, there is no question that Ms. Sellers was denied the right to apply for the counselor's position that was then open on the basis of her sex because she was specifically advised that it was a position for a male counselor, and that her application would not be accepted.

Now, I have to find that there is

no question that this was a threshhold refusal of the same nature that was contained in the Arnett v. Seattle General Hospital case, 65 W 2d 22, and in that particular case, a black lady called in on the telephone for a job in the dietary department of the hospital, and she was told to come in to apply for the job. She went in and when they -- she came face to face with the supervisor of the dietary department of the hospital and they saw that she was black, she was told that there were no openings period as far as the dietary department was concerned. She went home and asked a friend to call in respect to the job, and this friend was told to come on in and file an application.

Now, the actual ruling on the case was whether or not the Superior Court had correctly modified an order of the Commission which said that the hospital

had to hire her. The Superior Court modified to just -- just modified the tribunal's decision to just say, "Take an application. You don't have to hire her," but the Supreme Court reversed that and said the Commission's ruling, the tribunal's ruling was correct. They did have to hire her if there was a position open.

But the case did recognize that there was threshhold discrimination in not accepting an application and allowing the person to equally compete for a job which was open, and they stated it in this language, and I am quoting directly from the case:

> "In this case there is no dispute in the facts and the conclusion that an unfair practice was committed."

So it is recognized there that there is such a thing as a threshhold refusal, and that it is an unfair practice.

Now, in looking at this situation, I don't think that in going back and reconstructing everything that happened here that this was a particularly intentional -- well, the preference for the male counselor was intentional. There is no question about it, but the question has been raised that there was a contract with the Courts and so forth. In looking over that situation, first, I find that there wasn't any contract with the Courts. It was a policy guideline type of thing. There was no consideration or that type of thing that creates a contract. There was a policy set out by the Courts for the development of a work release program, and it stated in that policy that there should be a director of the work release program and a male and a female counselor. Now, in the testimony of Judge Patrick in connection with that particular langu-

age, he said, well, when we were drawing it up, we just didn't even think about the discrimination at that point in time. It hadn't occurred to us, and I think that is what occurred in this situation here. I don't think that it really simply occurred to the sheriff that the statutes, the laws on discrimination, and the Equal Rights Amendment, were particularly going to apply. I don't think that it was anything about that that was in his mind.

However, we are in a position where it does apply to everybody, including the Courts. If the Courts did even try to order that there be a male and female counselor, they couldn't do it. It would be an ultra vires act. It would be contrary to law, and they could not bind anybody by that.

It was simply an inadvertent situation, and I think that a lot of time and

a lot of energy and a lot of money at that juncture could have been averted if a good hard look had just been taken at the situation, a look at the statutes and the constitution, and say at that point, "Whoops, that is something I forgot about, and let's accept the application, and we will take other applications, and when we get to the screening process, we will just see who the best qualified person is."

That, to my way of thinking, would have been a far more reasonable solution as far as this particular problem is concerned. Even though there may be discrimination or what appears to be discrimination, you do have the situation that there is an exception for a bona fide occupational qualification, if there is such a thing.

I felt that that argument was a little bit on the frivclous side, quite

frankly. The case of Weeks v. Southern Bell Telephone which is in 408 Fed 2d 228, tells us what a bona fide occupational qualification is, and quoting from that case, they indicate:

> "We conclude that the principle of non-discrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

Now, looking at that language, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved, kind of takes us right out of the realm of bona fide occupational qualification in this particular case. It is simply refuted by the fact that Ms. Billingsley, the lady who had been doing this job for the past four years or so, past four or five years, in everybody's terminology

had done an excellent job. There is no question that women are able to perform safely and efficiently the duties of the job involved. She has shown that by her work experience in this particular situation. Even in the testimony of Sheriff Boyles, he had been surprised at the qualifications that Ms. Sellers had in respect to applying for this position in view of the salary that was proposed for it.

Now, I read with great particularity the testimony of the various court personnel, members of the prosecutor's office and the experts in the field that were called, Mr. Pierson and Dr. Sherman and so forth, there is no question, I don't think, and I am not in disagreement with this at all, that it would be helpful to have both a male and female counselor. It is a preference they all expressed, that this is a preference for the good

of the program, but preference is really another word for discrimination. I prefer if I go to a barber that I have a white barber as opposed to a black barber. I prefer that if I am taking an airline flight that I would have a stewardess rather than a male steward on the airplane. Those are discrimination situations, and as I say, it would be preferable, and I agree with that concept entirely, that it certainly is preferable that there will be both a male and female counselor. But again, preference is just another word for discrimination. I have the right to pick and choose as opposed to the rights of the other person to be treated equally in applying for the position.

It is interesting to note what this preference type of situation means. I tried to look at this issue of sex discrimination in terms of both the BFOQ,

and what it means in terms of equal protection and discrimination on behalf of sex and everything else, and I looked through the cases of the State of Washington, and there are a number of them, and I would just call them to your attention.

None of these were cited by counsel in their briefs, but I would just call them to your attention. Before the ERA actually came in, the sex discrimination cases were generally brought under the First Amendment of the United States Constitution and the Constitution of the State of Washington, the Equal Protection Clause, and there were three or four of those cases.

One that I would call your attention to is the J.S.K. Enterprises v. City of Lacey, in 6 Wash App 43. In that particular case, they held it was unconstitutional for the City of Lacey

to pass an ordinance which would prohibit persons from giving massages to others of the opposite sex. They just said, you are basing this strictly on sex, and it is not something that one or the other person cannot do, and therefore, that is unconstitutional.

We have the Darrin v. Gould case, in 85 W 2d 859, where under the Equal Protection Clause, they held it was unconstitutional to deny the right to two fairly large girls to try out for the highschool football team. I think some of you remember that particular situation.

The Hanson v. Hutt case, in 83 W 2nd 195, went a little further. There was a statute there which barred women from unemployment compensation benefits due to pregnancy, and our Supreme Court held that was unconstitutional as discriminating between women on the basis of sex. It goes a long ways.

Then the ERA came in, and under the previous Equal Protection cases, you first had to prove that the discrimination on the basis of sex was a suspect class, and you subjected it to strict scrutiny, and had to find proof of a compelling state interest. Well, then after the ERA was passed, along comes Marchioro v Chaney, in 90 W 2d 298, a relatively recent case, and it tells us that the Equal Rights Amendment now is too broad; that we need not use this old approach of first determining the discrimination, sex discrimination as a suspect class, subjecting it to strict scrutiny, and then proving a compelling state interest. There they just held that you have to, without any question, give complete equal opportunity under the Equal Rights Amendment. In that particular case, that was the one where the State Democratic Central Committee was involved

because the statutes required that the State Central Committee be 50 percent men and 50 percent women, and that was challenged on the basis that you are not giving equal opportunity, but they held that that statute was okay and was constitutional because it did make it a 50-50 situation.

But as I say, those are some other cases that indicate the extent to which these laws against discrimination and Equal Rights Amendment are going to be applied.

Now, in connection with this, and I am going back to the bona fide occupational qualifications, and what I said, that is totally refuted without any question on that, and so the exception does not apply in this particular situation.

Now, going to the question of the decision of the tribunal as to the damages here and everything else like that, the

tribunal has the statutory authority to determine and fashion the remedy as far as this procedure is concerned, and it doesn't violate any due process or anything else in so doing.

Now, I would call your attention to this Rody v Hollis case, in 81 W 2d 88, where the Supreme Court indicates that:

> "We are satisfied from the record in this case and from the relevant statutory provisions that the hearing and appeal procedure for the Human Rights Commission tribunal, as detailed in . . ." that statute ". . . meets the requirements of due process,"

and we can only conclude that the tribunal's power to fix the amount of penalty is consistent with due process. They also held in that case that there was no unconstitutional delegation of power by the legislature to the Commission.

Now, in this particular situation, I don't think that there is any particular question that there were funds avail-

able for a year for this position. Initially the funding was for two and a half months under the EEA contract, and then the balance was to be picked up under CETA because of the changeover that was going to take place, and both of those contracts were prepared, the funds were available, and they wouldn't have been filling a position for a two month period if it wasn't readily apparent that the funds were going to be available for the whole year. So there is no question, I don't think, that the tribunal acted within their authority in assessing the penalty for the year that those contracts were to be in existence.

Now, the question came up in terms of the duty to mitigate on the part of Ms. Sellers in this particular connection, and I think that that duty to mitigate is somewhat covered in the Wilson v Walla Walla case, at 12 Wash App 152.

There was some argument made to the Court that apparently Ms. Sellers had not sought other employment particularly in what was indicated to me was a "job hungry market". I can't see how there would be a job hungry market when she had been unemployed and drawing unemployment compensation which meant that she had to be referred out to jobs where her qualifications would fit for a year's period of time. If a person has particular qualifications for a position but there are no positions available, then we don't have a situation where there is a job hungry market. There was no requirement on her part initially to mitigate, and secondly, there was no showing that there were jobs available as far as this particular matter is concerned.

So in summing this all up and going back again to the actual criteria that the Court had to look at in assessing

this, and this is binding, of course, as far as the Court is concerned in what I can do on this, I cannot substitute my judgment for that of the tribunal. I would have to find that the tribunal's findings, conclusions and decisions were affected by any other error of law, and I don't find that. I find that they are specifically within the statute and the constitutional amendment, the Equal Rights Amendment.

As far as whether the findings were clearly erroneous, in view of the entire record, and I have just covered the testimony on that, and I don't find that they were erroneous at all. I felt that there was no other conclusion that reasonably could have been reached in this matter within the framework of the law. It is consistent with the public policy contained in the act of the legislature, and of course, I cannot find that it was ar-

bitrary and capricious because the case tells us that if there is room for two opinions, then it is not arbitrary and capricious.

I therefore would have to, within the law and the evidence as it was presented to the tribunal, would have to find that this Court must affirm the opinion and findings and order of the tribunal of the Human Rights Commission in this particular matter. It is affirmed in all respects.

So I think then, counsel can prepare the proper findings and conclusions as far as this Court is concerned and an order that would reflect that and present that to the Court then for signature in the matter.

MR. TYTLER: Yes. I will do so, your Honor.

THE COURT: All right. Is there any other matter to come before the Court?

If not, we will stand adjourned.

(End of proceedings.)

STATE OF WASHINGTON)
) ss.
COUNTY OF FRANKLIN)

I, Vickie Shepard, Official Court Reporter for Franklin County Superior Court, do hereby certify that I reported the proceedings had in the matter of Franklin County Sheriff's Office v. Betty P. Sellers and Washington State Human Rights Commission v. Franklin County Sheriff Richard E. Boyles, No. 23165, before the HONORABLE WALTER A. STAUFFACHER, visiting Superior Court Judge from the County of Yakima, on October 6, 1978; that the same was reduced to typewritten form by me, and that the attached 28 pages represent a full, true and accurate transcript of my Stenotype notes.

s/Vickie Shepard
Vickie Shepard
Official Court Reporter

DATED:
November 13,
1978.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FRANKLIN COUNTY SHERIFF'S OFFICE, Appellant,	)	NO. 3254-III-0
v.	)	Division Three Panel Two
BETTY P. SELLERS, complainant, WASHINGTON STATE HUMAN RIGHTS COMMISSION,	)	27 Wn.App. 797, 621 P.2d 751
Respondent.	)	Filed Dec. 9, 1980

GREEN, C.J.--Franklin County appeals a judgment awarding damages for discriminatory employment practices, in violation of RCW 49.60.180. We reverse.

On June 21, 1974, Betty Sellers, who was working toward a master's degree in guidance and counseling, learned there was an opening for a work-release counselor in the Franklin County Sheriff's office. She telephoned the sheriff's office and informed Shirley Billingsley, who was the director of the work-release program and the only counselor, that she

wanted to apply for the position. Mrs. Billingsley confirmed that a counselor position was available, but added that the present need was for a male counselor. Mrs. Billingsley suggested she fill out an application in the event a future position became available. Instead of making an application, Mrs. Sellers filed a complaint with the Washington State Human Rights Commission, alleging discrimination in employment based on sex. A tribunal of the Commission found that limiting the available counselor position to a male was discriminatory and was not a bona fide occupational qualification (BFOQ) exempt from the Act. Mrs. Sellers was awarded, in addition to other relief, $7200 representing the amount she would have received had she been employed by the County. The County appealed the Commission's order and the Superior Court

affirmed. This appeal followed.

The County contends the tribunal and then the court erred in finding (1) there was no evidence that women as a class could not perform the functions of a work-release counselor, and (2) employment of a male counselor was not necessary for the successful implementation of the county's work-release program. Since the resolution of these issues is a mixed question of law and fact, we will exercise our inherent and statutory authority to make a de novo review of the record independent of the Commission's decision. RCW 34.03.130(6)(d); The Daily Herald Co. v. The Department of Employment Security, 91 Wn.2d 559, 588 P.2d 1157 (1979).

Our State law against discrimination is found in RCW 49.60 and is patterned after Title VII of the United States Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. The federal Act and the decisions

construing it are persuasive authority for the construction of our State Act. RCW 49.60; Ellingson v. Spokane Mortgage Co., 19 Wn.App. 48, 54, n.5, 573 P.2d 389 (1978).[1]

The BFOQ exemption is found in RCW 49.60.180:

> It is an unfair practice for any employer:
> (1) To refuse to hire any person because of such person's . . .sex . . . unless based upon a bona fide occupational qualification [BFOQ] . . .

(Italics ours.) The Act does not define "BFOQ". However, the Human Rights Commission, in WAC 162-16-020(2), has recog-

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[1] Further, WAC 162-30-010 states:
"In the interest of consistency and to avoid confusion on the part of persons governed by both the state and federal sex discrimination laws, the commission will generally follow interpretations of the sex discrimination provisions of Title VII of the United States Civil Rights Act of 1964, 42 U.S.C. sec. 2000e and following, where the federal act is comparable to the state act."
See Lindsay v. Seattle, 86 Wn.2d 698, 708, 548 P.2d 320 (1976).

nized that the BFOQ exemption may apply:

> (a) Where a person's . . . sex. . . will be essential to, or will contribute to, the accomplishment of the purposes for which the person is hired.

By comparison, the federal Act, in 42 U.S. C. sec. 2000e-2(e) (1976), defines BFOQ as an employment practice that is

> reasonably necessary to the normal operation of that particular business or enterprise . . .

It is evident that the Commission defines BFOQ as something less than "necessary" but more than merely "contributing to" the purpose for which a person is hired. Since the federal Act was used as a guide in writing our State law, we conclude the two definitions are essentially synonymous.

The issue presented, then, is whether limiting the available counselor position to male applicants was "reasonably necessary" to the successful operation of the

work-release program in Franklin County. The County has the burden of proving the exemption. Rose v. Hanna Mining Co., 94 Wn.2d 307, 311-13, 616 P.2d 1229 (1980).

Mrs. Billingsley, director of the Franklin County Work Release program, testified that she was employed as a counselor in the sheriff's office in 1972. The purpose of the counseling position was to help inmates decide what kind of jobs or educational training was needed to assimilate them into the community. To this end, she counseled the inmates, arranged for employment interviews or training programs, and transported the female inmates for the purpose of completing those arrangements. When further mental health counseling was needed, or medical or dental care was required, she arranged for an appointment and then transported the female inmates to the appropriate place.

As part of her duties, she often searched the female inmates for contraband upon their return from work.

When Mrs. Billingsley was first employed, she worked with a male counselor. He performed the same duties with respect to the male inmates as she performed for the female inmates. In 1974, the male counselor departed and Mrs. Billingsley became the director and only counselor. She had to refer males to the mental health center for counseling when her sex prevented her from establishing an adequate rapport with them. Further, she could not search the male inmates, transport them to interviews, the mental health center, the doctor or dentist. As a result, the male jailers and others were required to perform many of the functions of the male counselor. She testified that because of the workload, she could have used the help of either a man or a woman

counselor; however, a male counselor would have been more beneficial to her and to the needs of the inmates.

Charles Pierson, Jr., who was responsible for the Columbia Mental Health Center's jail services counseling project, confirmed the need for a male counselor at the Franklin County jail. The Center, which was not a county organization, offered to assist the sheriff's office and, consequently, Mr. Pierson counseled Franklin County inmates during 1975-77. Because Mrs. Billingsley was the only counselor, Mr. Pierson counseled many male inmates for work-release purposes. He explained the reason for his involvement:

> There was a good number of clients, and Shirley [Billingsley] needed my support or the other male counselors' support that was available at that time in order to work with these individuals. Many of the people in jail are very much unskilled as relating to people in

> general, and many of those manipulative and concealing when they deal with a woman. So it was necessary in many cases, for Shirley to refer mostly males to myself . . .

(Italics ours.) He stated that the establishment of a relationship with an inmate is a crucial part of the counseling process

> . . . the actual process is one of establishment of a relationship with an individual. That's the required beginning, unless you can interact with a person . . . you can't possibly hope to help him change. Once that relationship is established, then, you can work at a process of confronting an individual with his maladaptive or unsuccessful or illegal behavior. That, then, gives you the end and the opportunity to work towards the behavior change in the person.

He further testified that when "a person is not revealing all that's going on with them [sic] and is not dealing with the issues that are important to them [sic]:, the person may not be relating to the counselor because of his or her sex. He concluded:

> In some cases, it's possible for a female to relate to some female[s] and impossible for a female to relate to some male[s], just as I cannot be all things to all clients. There are some clients that I can't relate to . . .because of my sex.

After noting that the inmate population was 90 percent male and 10 percent female, Mr. Pierson commented that "in some ways it is more desirable to have a male than a female running the program."

When asked upon cross-examination whether in his opinion a male was only preferable to the program, Mr. Pierson testified an additional female could not service the program as effectively as a male. The Center's jail services project always provided for female and male staff and he believed the dynamics of the Center's counseling program were the same as the work-release program. In his opinion, to hire an additional female counselor in the sheriff's work-

release department would create a redundancy.

Dr. William D. Sherman, a physician and psychiatrist at the Columbia Mental Health Center, who was familiar with the Franklin County work-release program, supported the views expressed by Mr. Pierson. He expressed a very strong opinion supporting the validity of the sheriff's request for a male counselor to balance Mrs. Billingsley. He testified:

> There are profound advantages to having a member of . . . .each sex on a staff of this type. There are several reasons for this. . . . Human beings relate differently to males and females, sometimes for better and sometimes for worse . . . In the course of growing up many of us relate much better to one sex than the other in a counseling way.
> . . . I think it is necesary to have a member of both sexes available because the work release program depends heavily on the counseling that goes on and the guidance that goes on from the staff to the people in the program. Many people grow up without an adequate male

> or female model of what it's like to be a competent and happy person of their own sex making out in the world, and I think that idea of a staff should be provided and modeled to both male and female people that are in the work release program. This is a part of the counseling help that can go on in a program like this. . . .
>
> It's my opinion that the program would be seriously impaired if both counselors were of the same sex no matter which sex. The evidence of this is drawn of literature . . . people are helping others to expand their lives. Get rehabilitated. The program is better with mixed sex staffs . . . It is true of the group therapy groups that they do better if the two therapists are of opposite sex. The programs do better with mixed staff on the counseling, mixed sex. . . .
>
> I would strongly support that both sex be represented and the staff not consist of either two females or two males.

(Italics ours.) It was his view that if the only qualified applicant was a woman, only temporary arrangements should be made and the position should be left open until a qualified male became avail-

able. He stated, "I would certainly not want to get locked into a position with two members of the same sex indefinitely running a program like this." He conceded that Shirley Billingsley had operated a good program during the time she had been alone. However, he observed ". . .the program has been hurt. I feel, the program could have been more successful with a competent male working with Mrs. Billingsley . . . over the last three years."

Lane Merryman was the supervisor for the Tri-Cities work/training-release program for the State of Washington in Pasco. He generally echoed the views of Mr. Pierson and Dr. Sherman. He believed a male and female counselor would make the work-release program more successful.

Ray Messegee, director the the Adult Correction Division for the Department of

Social and Health Services, testified on behalf of Mrs. Sellers. In his opinion, there was no scientific way to evaluate the extent to which one sex or the other contributes to a successful counseling relationship. Consequently, he concluded that sex is not a significant factor in the counseling situation; it is merely one of many factors. Notwithstanding, he testified that in hiring counselors in his department, he instructed his staff to make every attempt to equalize the numbers of each sex. As a result, the number of males and females were about equal and either sex was available for a counseling assignment as needed.

Sheriff Boyles expressed his needs to the Human Rights Commission in a letter dated July 11, 1974:

> Just recently E.E.A. provided funds enabling this department to hire one or more employee for this [work release] section.

> It is my feeling that this employee should be a male since there are times that a male cannot communicate with a person of the opposite gender, and that the male prisoners on work release are much greater than the amount of females we have on work release.
>
> When the funds became available for this opening, I instructed the Work Release Director to screen all male applicants leaving the final decision to myself as to who would be hired. I, at this time, still feel this position should be filled by a male counselor.

These needs are also reflected in the statement of purposes and objectives of the work-release program, approved by three Superior Court judges and the work-release director. It states: "The staff is comprised of the Program Director and two counselors, a male and female."[2]

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[2]The program description indicates the female would perform secretarial duties in addition to counseling. The addition of secretarial duties is not a problem here. As the program developed, the female became the Program Director and the sole counselor. The facts do not show, nor do the parties argue, that the employment practices were discriminatory on this basis.

Further, the need for a sexual balance in the staff was supported by Deputy Prosecuting Attorney Lawrence Moore who worked closely with the program.

Mrs. Sellers contends this evidence did not establish that restricting the position to a male counselor was a BFOQ, but shows only that hiring a male counselor was a preference or convenience. She argues the County must prove that all or substantially all women would be unable to efficiently perform the counselor duties, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969),[3] and the essence of the operation would be undermined by hiring a woman. Diaz v. Pan American World Airways, Inc., 442 P.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950, 30 L.Ed.2d 267, 92 S.Ct. 275 (1971).

[3] Cf. Rose v. Hanna Mining Co., 94 Wn.2d 307, 311-13, 616 P.2d 1229 (1980) (epileptic handicap).

We agree with the general rules set forth in these cases. However, we find them to be factually distinguishable because they involve restrictions limiting a job category to one sex or class exclusively.[4] Here, the County did not limit the two counselor positions to one sex, but sought to achieve a balance by providing

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[4] Weeks v. Southern Bell Tel. & Tel. Co., supra, involved a restriction due to physical requirements of a job, and Diaz v. Pan American World Airways, Inc., supra, involved a restriction to female flight cabin attendants. See also, Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (physical requirements); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (D.C. La. 1979) (limitation upon hours women could work); Sprogis v. United Airlines, Inc., 444 F.2d 1194, cert. denied, 404 U.S. 991, 30 L. Ed.2d 543, 92 S.Ct. 536 (1971) (limitations to unmarried females or termination of pregnant females); Dothard v. Rawlinson, 433 U.S. 321, 53 L.Ed.2d 786, 97 S. Ct. 2720 (1977) (restriction to male prison security guards). Similar restrictions to job categories may be found in 12 A.L.R. Fed. Employment - Sex Discrimination, sec. 21 at 104 (1972).

both a female and male counselor to better meet the psychological needs of the inmates. Consequently, the cases are not helpful. However, even if those cases were applicable, we are convinced the restriction imposed here is within the BFOQ exception as defined by Weeks and Diaz.

The court in Diaz, supra, at 389, observed that the Equal Employment Opportunity Commission's guidelines, 29 C.F.R. sec. 1604.1(iii) (1979), state the refusal to hire an individual because of the preference of co-workers, the employer or clients is not a BFOQ. However, the court also stated that a preference would be valid if a company would be unable to perform its primary function or the service it offers unless the limitation is imposed.

Here, the essence or purpose of

the counseling position is rehabilitation of people. It is important that the counselor be able to relate to an inmate in such a way that the inmate will freely and openly discuss employment interests and be susceptible to motivation toward obtaining or training for a job and then succeeding in the chosen area. The need for a male-female balance in the two counseling positions was strongly confirmed by the counselors and the psychiatrist who testified for the County. Even Mrs. Billingsley's testimony showed that she believed a male counselor was reasonably necessary to fulfill the primary purpose of the program. Although there is testimony that Mrs. Billingsley was doing an excellent job as a counselor, she testified that because of her sex she had to refer male inmates to the Mental Health Center for work release coun-

seling. Moreover, she had to enlist the aid of others not involved in the program to perform her other duties. Consequently, Mrs. Billingsley was unable to perform the primary functions required by the program in providing counseling, transportation and security for all the inmates. Since the program provided for only two counselors, the addition of another female counselor would perpetuate these deficiencies. An all-female counseling staff could not efficiently perform the duties and would thus undermine the essence of the program. See, City of Philadelphia v. Pennsylvania Human Rights Commission, 7 Pa. Commonwealth 500, 300 A.2d 97 (1973) (juvenile detention facility supervisors).

The Human Rights Commission, in WAC 162-16-020, while recognizing that the legislature has not defined BFOQ, stated:

"Its meaning must be worked out through experience in administering the law and with reference to the general purposes of the law against discrimination and other expressions of public policy." There is a strong public interest in rehabilitating people so they may be constructive citizens. Every effort should be made to achieve this goal. Considering the entire record, we find that providing a sexual balance of both a female and a male counselor is not only preferable, but is reasonably necessary to the rehabilitation of the Franklin County inmates and the success of the work-release program. In this context the record supports the conclusion that all or substantially all women could not fulfill the purposes of the program. Therefore, limiting the second position to a male counselor is a bona fide occupational

qualification exempt from the Act.

Reversed.

s/Green, C.J.

WE CONCUR:

s/ Roe, J.

ROE, J. (concurring specially)--I concur in the analysis and result of Judge Green's opinion.

I state, as an additional reason why this case should be reversed, as follows:

Assuming Betty Sellers established a prima facie case of discrimination which does not come within the BFOQ exception, I would find it necessary to address the issue of damages. The trial court and the tribunal awarded Sellers $7,200 in back pay representing the wages she would have earned from June 21, 1974, through June 18, 1975. Back pay is a well-recognized remedy in order to "make whole" the person who has suffered discrimination. Generally, good faith or lack of intent is no defense. Albermarle Paper Co. v. Moody, 422 U.S. 405, 45 L.Ed.

2d 280, 95 S.Ct. 2362 (1975). Nevertheless, under the Civil Rights Act of 1964, tit. VII, an employer does have a defense from liability if he relied on any written interpretation or opinion of the Commission. 42 U.S.C., sec. 2000e-12(b) (1974), reads in part:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, . . .

(Italics mine.) See Albemarle Paper Co. v. Moody, supra at 95 S.Ct. 2374, n.17.

I note that under our state statute or regulations, no immunity from liability exists. However, I also observe that the Human Rights Commission does absolve one from liability for reliance

on the opinions of the executive secretary of the Human Rights Commission and the declaratory rulings issued by the commission. WAC 162-04-070(5); WAC 162-08-700(8). I believe such reliance should also extend to the commission's regulations which are published and on which an individual has a right to rely. See Rosenfeld v. Southern Pac. Co., 519 F.2d 527 (9th Cir. 1975); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Stryker v. Register Publishing Co., 423 F. Supp. 476 (D. Conn. 1976); LeBlanc v. Southern Bell Telephone and Telegraph Co., 333 F. Supp. 602 (E.D. La. 1971), aff'd 460 F.2d 1228 (5th Cir. 1972), cert. denied 409 U.S. 990. Even if Betty Sellers had proved sex discrimination, the damage portion of the judgment against

Franklin County would be inappropriate. Because Franklin County believed a male would contribute to the accomplishment of its counseling program and hiring a male would come within the existing BFOQ exception, no back pay award should be granted under any disposition of this case.

s/Roe, J.

Franklin County v. Sellers (Dissent)

No. 3254-III-0

MUNSON, J. (Dissenting)--I believe the Franklin County Sheriff's Office has failed to meet its burden of factually proving it was reasonably necessary to hire a man to fill the position for which Betty Sellers applied. Furthermore, the majority incorrectly applies the law defining a bona fide occupational qualification (BFOQ) to this fact situation.

By discussing a BFOQ defense, the majority admits discrimination occurred. A BFOQ can exist only to justify an act of discrimination. Betty Sellers inquired about the position and was told that no women were to be hired; the fact that she took no further steps to apply is irrelevant. Arnett v. Seattle General Hospital, 65 Wn.2d 22, 395 P.2d 503 (1964); see also Pittsburgh Press Co. v. Pittsburgh Comm'n

on Human Relations, 413 U.S. 376, 37 L.Ed. 2d 699, 93 S.Ct. 2553 (1973); Hailes v. United Air Lines, 464 F.2d 1006, 1008 (5th Cir. 1972); Gillin v. Federal Paper Board Co., 479 F.2d 97 (2nd Cir. 1973). Sellers has made a prima facie case. The burden has shifted to the county to show a legitimate, nondiscriminatory reason for rejecting her. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973); Rose v. Hanna Mining Co., 94 Wn.2d 307, 311-13, 616 P.2d 1229 (1980).

The first issue upon which I differ from the majority is the nature of the job for which Sellers applied. The majority has selected testimony which supports its view. There is other evidence which supports the contrary view, adopted by the trier of fact. The statement of purposes and objectives of the work-release program,

approved by the superior court judges and the work-release director stated:

> The staff function is as follows:
> 1. Screen and select participants.
> 2. Counsel and provide assistance from community resources in specific fields of mental hygiene treatment.
> 3. Determine means for educational and occupational training.
> 4. Develop and maintain records and provide participant progress reports.
> 5. Establish participant's financial program and maintain financial records concerning earnings and disbursements.
> 6. Coordinate and establish communication lines between all departments associated with the program.
> 7. Promote community understanding and acceptance.

(Italics mine.) The document also states the objectives of the work-release program:

> 1. To provide counseling and training to promote understanding and motivation for the potential fulfillment of healthy attitudes, and
> 2. To implement employment for economic responsibility, and to meet financial obligations.
>
> . . .
>
> The primary purpose of the aforementioned objectives, is to help prepare the participant to live in society with the respect and security for self, family and community.

Finally, under the section giving a program description for staff and function, the document stated:

> The staff is comprised of the Program Director and two counselors, a male and a female. The female counselor will be responsible for secretarial duties in addition to her counseling activity. . . .

Shirley Billingsley, the current director of the work-release program in Franklin County, indicated the job involved "job counseling." She testified she performed the bookkeeping and secretarial duties for the program, provided transportation and occasionally searched returning program members. Billingsley testified she did not do mental health counseling; when that was required she referred men and women to outside mental health counselors such as Chuck Pierson, who argued strongly for a male counselor.[1]

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[1]Pierson apparently would not have hired a woman under any circumstances. When asked if he would hire a more quali-

The majority isolates three areas where, because of the predominantly male prison population, a female counselor would be unable to perform the job. Two of these, the need to transport prisoners and perform strip searches, are insignificant[2] aspects of the job and at best inconvenience a female counselor. The real thrust of the majority opinion is that the type of counseling involved requires a male rather than a female because some male inmates do not "relate well" to female counselors. This was

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fied woman, he said "skills are something that we can train people to acquire. We can't get people to change their sex." Transcript of H.R.C. hearing p. 235 lines 15-17.

[2]Nothing in the job description signified searching prisoners is within the classification of this position. Query: If a prisoner is unsafe to transport, is the prisoner safe enough to be in a work-release program?

primarily the testimony of Mr. Pierson, in whose opinion some 10 percent of the male population of the prison might not "like" a female counselor. Pierson suggested the program worked less well having only a female counselor. But how much so--how far short it fell of its basic goal--he did not say. Nor does he say that those who cannot relate to a counselor are entirely deprived of benefit--he says only that it is easier to help these people, without sex barriers being a problem. Contrary to Pierson's testimony, is that of Ray Messegee, director of the Adult Corrections Division of the Department of Social and Health Services. He feels, based upon research and 18 years of experience, that sex make absolutely no difference in a counseling setting. Although the counselors hired for his programs have tended,

overall, to average half male and half female, from the beginning his program hired work-release counselors without regard to sex. In fact, in one work-release setting--the city jail in Pasco--there were eight female counselors and no males at all, to deal with an all-male inmate population.

Lane Merryman, supervisor of the Pasco work-release program, said he felt a male would be helpful to the program, but concluded he would certainly hire a woman if there were no equally qualified men. And perhaps the most damaging of all is the testimony of Sheriff Boyles of Franklin County. Boyles is ultimately responsible for hiring counselors in the work-release program in Franklin County. Although he wanted to hire a man, Boyles admits Shirley Billingsley has run the program, by herself, for 4 years and has

done an excellent job. Boyles said that if male applicants for the other position had been less qualified, he might well have hired Sellers. In fact, he said he might have hired her if he had only seen her application, because he never expected to attract anyone, male or female, with her qualifications.

There is a considerable difference of opinion as to the desirability and necessity of having a male counselor to complement Shirley Billingsley. I suggest the original trier of fact was best suited to make this determination. The Human Rights Commission found against the county; we should give its decision respect, as we would any trier of fact.

The majority states that as a practical matter the definition of a BFOQ under WAC 162-16-020(2)(a) is equivalent to 42 U.S.C. sec. 2000e-2(e) (1976). However, the logical result of conclud-

ing the two definitions are equivalent is that the federal tests for a BFOQ should control exclusively. The majority uses a somewhat softer interpretation, somewhere between "strict necessity" and "contributing to," but leaning toward "contribute to." Nonetheless, the language in WAC 162-16-020(2)(a) is written in the alternative, "essential to or will contribute to." This language is far broader than permitted under the federal definition of a BFOQ. Because of the parallel nature of the state and federal statutes, definitions under the state statute, RCW 49.60, are controlled by the breadth of the United States Civil Rights Act of 1964, tit. VII, 42 U.S.C. sec. 2000e (1976). Rose v. Hanna Mining Co., supra; Ellingson v. Spokane Mortgage Co., 19 Wn. App. 48, 54, n.5, 573 P.2d 389 (1978). See also WAC 162-30-010. The Human Rights Commission relied exclu-

sively upon federal law. Furthermore, the commission made no attempt to defend its regulation defining sex dixcrimination. I would hold WAC 162-16-020(2)(a) is overbroad and should be changed to reflect the current status of federal law; state laws cannot stand if they impede, burden or frustrate the purpose of tit. VII. Lindsay v. Seattle, 86 Wn.2d 698, 708, 548 P.2d 320 (1976), cert. denied 429 U.S. 886.

The majority distinguishes the federal test for BFOQ in Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (weight lifting limitations) and Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir.) cert. denied 404 U.S. 950, 30 L.Ed. 2d 267, 92 S.Ct. 275 (1971) (rejecting argument that all-female airplane cabin attendants better "reassured" passengers and demonstrably improved average per-

formance), because those cases dealt with restrictions limiting a job category exclusively to one sex, whereas Franklin County sought a male-female balance in the two positions. If one assumes that sexual balance of any two positions is desirable, hiring only a man to fill the second position when the first was filled by a woman is logically necessary. But making that initial assumption begs the question. The decision to have sexual balance in any two positions is itself a discriminatory decision, subject to scrutiny under Weeks and Diaz.

Therefore, the better analysis of the action of Franklin County is whether under Weeks v. Southern Bell Tel. & Tel. Co., supra all, or substantially all, two-woman counseling teams would be unable to perform their required functions; or whether under Diaz v. Pan American

World Airways, Inc., supra at 388, the essence of the operation would be undermined hiring all-female counselors. See also Dothard v. Rawlinson, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct. 2720 (1977); Rose v. Hanna Mining Co., supra.

The majority opinion speaks only to Equal Opportunity Commission Guidelines found at 29 C.F.R. sec. 1604.2(a)(iii) (1979), which deal with preferences of clients. It argues the preference of clients in this case is so important as to make the function of the work-release program impossible without mixed-sex counseling. This relates most closely to the "essential function" test of Diaz. Yet, as noted, at best only 10 percent of male inmates are unable to relate to counselors; and the county was unable to provide testimony that indicated the essential purpose of the program would fail

because of this; or that work-release participants were unable to find jobs.

The fact that Sheriff Boyles would have hired Sellers if no equally qualified male were available recognizes the program could be carried on with only female counselors. The essential functions of the program were to find jobs and counsel inmates in dealing with the real world. No testimony suggested the program was failing of this purpose for want of a male counselor. The testimony suggested the program might run somewhat better with a male counselor--that it would be more convenient to the prison staff--not that it failed.

Therefore, under the narrow view imposed by federal law, I would find WAC 162-16-020(2)(a) invalid and I would find no BFOQ.

Notwithstanding, I would be inclined

to apply this decision prospectively. As noted in Judge Roe's concurring opinion, the county had the right to rely upon what I consider an invalid regulation. I would award Sellers nominal damages and modify the other sanctions imposed by the Human Rights Commission--that Sellers is to be given for 1 year (rather than 2 years as awarded by the commission) a first option on any job opening in Franklin County for which she is qualified.

Finally, the county, and amicus, argue that the Human Rights Commission is an illegal tribunal. This argument was rejected in Rody v. Hollis, 81 Wn.2d 88, 500 P.2d 97 (1972).

Based on the foregoing, I would affirm the actions of the Human Rights Commission except as to damages.

s/ Munson, J.

IN THE SUPREME COURT OF THE STATE

OF WASHINGTON

FRANKLIN COUNTY SHERIFF'S OFFICE,	)	No. 47613-6
Petitioner,	)	
v.	)	EN BANC
BETTY P. SELLERS,	)	
Complainant-Defendant,	)	97 wn.2d 317, 646 P.2d 113
and	)	
WASHINGTON STATE HUMAN RIGHTS COMMISSION,	)	
Respondent/Cross-Petitioner.	)	Filed May 13, 1982.

DIMMICK, J. -- This is a review of a contested case conducted by a hearing tribunal of the Washington State Human Rights Commission (Commission). The tribunal awarded damages and other equitable relief to Betty Sellers on a sex discrimination claim brought against the Franklin County Sheriff's Office (County).

The trial court affirmed the findings, conclusions, and damages awarded by the tribunal. The Court of Appeals reversed in a 2-to-1 decision. This court granted both Sellers' and Franklin County's petitions for review. We reversed the Court of Appeals and uphold the trial court's affirmance of the hearing tribunal.

The facts, as determined from the record before us, are as follows:

In 1972, Franklin County formalized a work release program for county jail inmates. The draft called for a staff of a "Program Director and two counselors, a male and a female." County officials testified that in promulgating the regulations no thought was given to the fact that designating one counselor of each sex might be illegal employment discrimina-

tion.

In June 1974, Betty Sellers called the Franklin County Sheriff's Office to ask about the position for second counselor which she learned was open through the unemployment office. She was told by Shirley Billingsley, the woman who had been in the other counseling position for 4 years, that they would only consider a male counselor for the open position. Sellers filed a complaint with the Human Rights Commission.

The tribunal found that since Billingsley had for 4 years performed excellently as counselor in the program, the County had failed in its burden to prove that women as a class cannot perform the functions of a counselor in the work release program. The tribunal also found that the employment of a male counselor

is not necessary for the successful implementation of the County's work release program, but is merely a preference or convenience.

The trial court's review was conducted on the record of the hearing tribunal and the trial court did not itself take evidence or try any issues of fact. The court upheld the tribunal on the basis that there was no error of law, the findings were not clearly erroneous and the formation and actions of the hearing tribunal were not in excess of constitutional or statutory authority. (See RCW

34.04.130(6).)

The Court of Appeals viewed the issues resolved by the tribunal as mixed questions of law and fact and determined that it should exercise its "inherent and statutory authority to make a de novo review of the record independent of the Commission's decision." Franklin County Sheriff's Office v. Sellers, 27 Wn.App. 797, 799, 621 P.2d 751 (1980). The majority then proceeded to reweigh the evidence, making findings of fact that differed from the findings of the tribunal. The dissent found still different facts.

I

This gives rise to the first issue in this case. What is the scope of review of administrative action in contested cases?

The review procedures set forth in

the substantive act, Law Against Discrimination, RCW 49.60 remain substantially the same as when first enacted in 1949. Laws of 1949, ch. 183, Sec. 9. The procedures provided by that act for the most part merely clarify the scope of review:

> The findings of the administrative law judge as to the facts, if supported by substantial and competent evidence shall be conclusive. The court, upon its own motion or upon motion of either of the parties to the proceeding, may permit each party to introduce such additional evidence as the court may believe necessary to a proper decision of the cause.
> The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to a review by the supreme court or the court of appeals, on appeal, by either party, irrespective of the nature of the decree or judgment. Such appeal shall be taken and prosecuted in the same manner and form and with the same effect as is provided in other cases of appeal to the supreme court or the court of appeals, and the record so certified shall contain all that was before the lower court.

RCW 49.60.260(2), (3).

Those procedures, however, are not controlling. The administrative procedure act (APA), RCW 34.04.130(1), provides that a person aggrieved by a final decision in a contested case is "entitled to judicial review thereof only under [the APA] and such person may not use any other procedure . . . even though another procedure is provided elsewhere by a special statute or a statute of general application." This provision was adopted subsequent to the review procedures of RCW 49.60. Accordingly, it is clear that the review procedures of the APA must be adhered to in the instant case. Cf. Olson v. University of Wash., 89 Wn.2d 558, 573 P.2d 1308 (1978) (wherein this court held that the review procedures of a special statute adopted after the APA governed

our review).

Our review, like that of the superior court and the Court of Appeals, is under RCW 34.04.130(6) which provides:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or
> (f) arbitrary or capricious.

Difficulties as to application and scope of the APA standards are apparent in the line of cases interpreting the

above provisions.[1] But it is clear under the APA that review, whether conducted by the superior court, Court of Appeals, or Supreme Court, is limited to the record: "review shall be conducted by the court . . . and shall be confined to the record".

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[1] This is discussed in an analysis and critique of the major cases up to 1978 in Abrahams, Scope of Review of Administrative Action in Washington: A Proposal, 14 Gonz. L. Rev. 75 (1978).

Professor Abrahams' critique is directed to the lack of consistency in this court's applications of the APA review standards, the problem being to figure out when the court will substitute its judgment for that of an administrative agency and when it will defer to the agency's expertise. In reviewing the case before us, we will attempt to clarify this law, but we note that issues as to scope of appellate review of administrative decisions do not readily lend themselves to unvarying rules and standards of great predictability in any jurisdiction, most notably in the federal system. For a discussion of the irreconcilable lines of federal cases exemplifying this fact, see K. Davis, Administrative Law ch. 29-30 (3d ed. 1972).

RCW 34.04.130(5), with exceptions as set out. We have previously ruled that our review of administrative decisions is on the record of the administrative tribunal itself, not of the superior court. Department of Ecology v. Ballard Elks Lodge 827, 84 Wn.2d 551, 527 P.2d 1121 (1974); Farm Supply Distrib., Inc. v. State Utils. & Transp. Comm'n, 83 Wn.2d 446, 518 P.2d 1237 (1974).

II

ISSUES OF FACT UNDER THE APA

Judicial review is not selective, but must be conducted on the entire record, not by isolating evidence. Norway Hill Preservation & Protection Ass'n v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976). The duty of the reviewing court to search the entire record for evidence both supportive of and contrary

to the agency's findings is found in Universal Camera Corp. v. NLRB, 340 U.S. 474, 95 L.Ed 456, 71 S. Ct. 456 (1951). RCW 34.04.130(6)(e) addresses the clearly erroneous standard of review for factual determinations "in view of the entire record".

As previously discussed, the APA's clearly erroneous standard of review for factual determinations governs. The APA amendment in 1967 did away with a substantial evidence test replacing it with the clearly erroneous test. This change clearly indicated that the legislature intended to allow broader, more intensive review of an agency's factual determinations. Ancheta v. Daly, 77 Wn.2d 255, 259, 461 P.2d 531 (1969). See also Abrahams, Scope of Review of Administrative Action in Washington: A Proposal, 14 Gonz. L. Rev. 75, 80 (1978). The present test allows for

greater judicial scrutiny of agency fact finding, as the reviewing court can declare a finding to be clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Ancheta, at 259-60.

In Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959), we ended our former practice of trying de novo questions of fact already determined by trial courts. Cf. Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969) (Wherein this court reviewed the record de novo because the trial court had not heard testimony requiring it to assess the credibility of witnesses, to weigh evidence, or reconcile conflicting evidence). Substitution of our judgment

for that of the administrative agency in factual matters is not authorized by the APA, and by reasoning of Hesperian Orchards, we will not try facts de novo on review.

Although the Court of Appeals correctly points out that there was credible evidence contrary to the tribunal's findings, the findings are not "clearly erroneous" and should not have been tried de novo as was done by that court. See Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

III

ISSUES OF LAW UNDER THE APA

Next, the issues of law are reviewed under the APA, RCW 34.04.130(6)(d). The Bona Fide Occupational Qualification (BFOQ) definition as determined by the tribunal is a question of law, to which we apply the error of law standard. Since issues of law are the responsibility of the judi-

cial branch to resolve, the error of law standard allows the reviewing court to essentially substitute its judgment for that of the administrative body's, though substantial weight is accorded the agency's view of the law. As we said in Overton v. Economic Assistance Auth., 96 Wn.2d 552, 637 P.2d 652 (1981), at pages 554-55:

> Where an administrative agency is charged with administering a special field of law and endowed with quasi-judicial functions because of its expertise in that field, the agency's construction of statutory words and phrases and legislative intent should be accorded substantial weight when undergoing judicial review. . . . We also recognize the countervailing principle that it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law. . . . both history and uncontradicted authority make clear that it is emphatically the province and duty of the judiciary [sic] branch to say what the law is.

(Citations omitted.)

Washington's Law Against Discrimination provides for a BFOQ exemption in RCW 49.60.180:

> It is an unfair practice for any employer:
> (1) To refuse to hire any person because of such person's . . . sex . . . unless based upon a bona fide occupational qualification [BFOQ].

(Italics ours.) The act does not define BFOQ; however, the Human Rights Commission in WAC 162-16-020(2) defines the BFOQ exemption:

> (a) Where a person's . . . sex . . . will be essential to, or will contribute to, the accomplishment of the purposes for which the person is hired.

(Italics ours.)

By comparison, Title 7 of the Civil Rights Act of 1964, 42 U.S.C. sec 2000e-2 (e)(1) (1976) provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . .

> sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .

(Italics ours.)

The latter has been interpreted very narrowly in the federal courts to require an employer to establish that all or substantially all persons in the excluded class would be unable to efficiently perform the duties, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969), and the essence of the operation would be undermined by hiring anyone in that excluded class. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950, 30 L.Ed. 2d 267, 92 S.Ct. 275 (1971). Diaz states that mere preference cannot itself justify discriminatory practices in employment, it must rise to the level of a business necessity. See also Dothard v. Rawlinson, 433 U.S. 321, 53 L.Ed.2d 786, 97 S.Ct.

2720 (1977).

The hearing tribunal relied upon these federal cases in its determination that no BFOQ existed under Washington's Law Against Discrimination, RCW 49.60. We hold that such reliance was proper. The County asserts that the hearing tribunal erred in using these cases to interpret RCW 49.60 because WAC 162-16-020(2)(a) is written in the alternative, "essential to, or will contribute to". This language is far broader than that permitted under the federal definition of a BFOQ. We conclude that a literal interpretation of the regulation would frustrate the purposes of RCW 49.60. The legislature has directed that the law's provisions be liberally construed in order to accomplish its purposes. RCW 49.60.020.

We recognize that in promulgating WAC

162-16-020(2)(a) the Commission did not intend to impede the purposes of the Law Against Discrimination. In fact other provisions within the same chapter of the administrative code indicate that the Commission intended a narrower standard comparable to Title 7. WAC 162-16-020(2) provides:

> The term "bona fide occupational qualification" has not been defined by the legislature. Its meaning must be worked out through experience in administering the law and with reference to the general purposes of the law against discrimination and other expressions of public policy.

(Italics ours.) The Commission has expressed a public policy in WAC 162-16-130:

> Bona fide occupational qualification. The Commission believes that the BFOQ should be applied narrowly to jobs for which a particular quality of sex, race, age, etc. . . . ., is essential to the accomplishment of the purposes of the job. Where it is necessary for the purpose of authenticity or genuineness (e.g., model, actor, actress) or maintaining conventional standards of sexual privacy (e.g., lockerroom attendant, intimate ap-

parel fitter), the Commission will consider sex to be a BFOQ. Any other type of BFOQ should be very carefully considered. To be safe, the employer should request a BFOQ ruling from the Washington State Human Rights Commission and cite the ruling in the employment advertisement.

Anytime that an employment advertisement or notice expresses a preference, limitation, or discrimination based on sex, marital status, race, color, creed, age, national origin, or the presence of any physical, sensory, or mental handicap, the burden shall be on the employer to prove that the expression is justified by a BFOQ. In the absence of proof, the advertisement will be considered an unfair practice under the law. (For further guidance on the meaning of BFOQ, see WAC 162-16-020.) [Order 20, sec. 162-16-130, filed 1/20/75.]

In addition, WAC 162-30-010 provides:

In the interest of consistency and to avoid confusion on the part of persons governed by both the state and federal sex discrimination laws, the commission will generally follow interpretations of the sex discrimination provisions of Title VII of the United States Civil Rights Act of 1964, 42 USC, sec. 2000e and the following, where the federal act is comparable to the state act.

Accordingly, because a literal in-

terpretation of WAC 162-16-020(2) would frustrate the purposes of our law and other regulations indicate the comparable nature of a BFOQ under RCW 49.60 and Title 7 the hearing tribunal was correct in using Weeks and Diaz to interpret its regulation. The Court of Appeals, however, held that Weeks and Diaz were factually distinguishable and could not be relied upon because they involved restrictions limiting a job category to one sex or another exclusively whereas the instant case involves an attempt to achieve a female-male balance. We conclude for the following reasons that the factual distinctions are not relevant herein.

RCW 49.60.180(1) prohibits an employer from "refus[ing] to hire any person because of such person's . . . sex . . . unless based upon a bona fide occu-

pational qualification . . ." The County's decision to achieve a sexual balance by providing a male counselor and female counselor resulted in the County refusing to hire Sellers because of her sex. As such, the action was prohibited by the statute unless it was based upon a bona fide occupational qualification. We conclude that a decision to sexually balance the work force is subject to the BFOQ analysis of Weeks and Diaz. Accordingly, the inquiry is (1) under Weeks, whether all or substantially all 2-women counseling teams would be unable to perform their required function; or (2) under Diaz, whether the essential function of the program would be undermined if 2-women teams were utilized.[2]

In sum, we conclude that the hearing tribunal applied the correct standard in

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[2]Because we affirm the hearing ex-

determining that a BFOQ did not exist.

IV

MIXED ISSUES OF LAW AND FACT UNDER THE APA

Since we conclude that the tribunal applied the correct law to facts which were not clearly erroneous, there is no issue as to mixed questions of law and fact. However, an additional discussion relating to the proper scope of review of mixed issues of law and fact is necessary in light of the course taken by the Court of Appeals. The Court of Appeals characterized the case as one involving mixed questions of law and fact and pro-

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aminer's ruling that the County's actions in attempting to sexually balance its staff violates RCW 49.60, we need not reach the question of whether its actions violated the state Equal Rights Amendment or equal protection. Cf. Marchioro v. Chaney, 90 Wn.2d 298, 582 P.2d 487 (1978) (wherein we dealt with the constitutional claims).

ceeded to try the facts de novo in its application of the law.

A reviewing court is not able to review facts de novo on mixed questions of law and fact, though language in previous opinions led the Court of Appeals to mistakenly do so in this case. By mixed questions of law and fact we are really referring not to the facts themselves, nor the law governing the situation, but to the law as applied to those facts. "[E]quating the law application process with the fact identification process, as many courts do, can lead only to distorted analysis." Abrahams, at 77, citing L. Jaffe, Judicial Control of Administrative Action 546-48 (1965).

Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct

facts, with a view to determining the legal consequences. As we said in Daily Herald Co. v. Department of Employment Security, 91 Wn.2d 559, 561, 588 P.2d 1157 (1979), mixed questions of law and fact exist "where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term". We have invoked our inherent power to review de novo those issues. See Daily Herald; Department of Revenue v. Boeing Co., 85 Wn.2d 663, 538 P.2d 505 (1975); Weyerhaeuser Co. v. Department of Revenue, 16 Wn.App. 112, 553 P.2d 1349 (1976).

De novo review in these cases refers to the inherent authority of this court to determine the correct law, independently of the agency's decision, and apply it to the facts as found by the agency and upheld on review by this court. In Daily Herald we determined, then applied, the correct law to essentially undisputed facts. What we reviewed "de novo" was the meaning of the statute and how it applied to facts as determined by the trier of fact; we did not engage in reweighing evidence of credibility and demeanor.

In this case, the Court of Appeals was presented with evidence sharply in conflict, in the form of expert testimony, and the majority determined the weight of the evidence contrary to that of the fact finder. The dissent weighed the evidence again, coming to still another conclusion. We hold that it is not the province of the

reviewing court to try the facts de novo when presented with mixed questions of law and fact, whether on appeal from a judgment of the superior court, administrative tribunal, or administrative judge. See Bennett Veneer Factors, Inc. v. Brewer, 73 Wn.2d 849, 441 P.2d 128 (1968).

V

COUNTY'S APPEAL

The County contends that the formation and actions of the tribunal violated constitutional and statutory provisions. The trial court concluded that no such violations existed. The majority of the Court of Appeals did not address the issues. We affirm the trial court.

The County, and amicus, argue that the separation of powers doctrine has been violated because this case involves a dispute between individuals which should be decided by a court rather than an ad-

ministrative agency. This argument is without merit. We have clearly decided that legislatively created agencies may constitutionally act in a quasi-judicial capacity. Asarco Inc. v. Air Quality Coalation, 92 Wn.2d 685, 696, 601 P.2d 501 (1979). In addition, the delegation of adjudicative powers to the Human Rights Commission was expressly upheld in Rody v. Hollis, 81 Wn.2d 88, 500 P.2d 97 (1972).

The County also contends that the procedures followed by the Commission, i.e., the Human Rights Commission investigates the claim and also appoints a tribunal to adjudicate the claim, violates due process. RCW 49.60 and the Commission's rules contained in WAC 162-04 and 162-08 establish a tribunal composed of persons who had no part in the earlier stages of the case. We have previously upheld the legality of these pro-

cedures in Rody.[3]

The County's primary contention appears to be that it was denied a fair hearing. In this regard it argues that the interrelationship between WAC 162-08-278(7), concerning the law the tribunal shall apply, and WAC 162-08-211(6), concerning the law each tribunal member agrees to apply causes the tribunal members to be committed only to the Commission and its view of the law therefore

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[3]We note that the 1981 legislature has eliminated the provisions that form the basis of the County's objections. An administrative law judge appointed by the chief administrative law judge has been substituted for the hearing tribunal appointed by the chairperson of the Commission. Laws of 1981, ch. 259, sec.2, amending RCW 49.60.250. Uniform procedure rules promulgated by the chief administrative law judge will supersede Human Rights Commission regulations governing hearing procedures. Laws of 1981, ch. 67, ss. 8, 13, 14. These statutes will become fully effective on July 1, 1982. Laws of 1981, ch. 259, sec. 7; Laws of 1981, ch. 67, sec. 40.

denying parties like itself a fair trial.

WAC 162-08-211(6) requires each tribunal member to execute an "Acceptance of Appointment" form, stating:

> "I accept appointment as a member of the hearing tribunal which will hear the case captioned above for the Washington State Human Rights Commission.
> I certify that, to my knowledge, I have no conflicts of interest which would interfere with my ability to judge fairly and impartially.
> I promise to judge this case with fairness and impartiality to all parties and persons.
> I agree with the purposes of the law against discrimination and I will follow and apply the law against discrimination and the regulations, declaratory rulings, and other formal interpretations of the law against discrimination made by vote of the commissioners.
> I am willing to devote the time necessary to fully hear the case and decide it with reasonable promptness.
>
> Dated_____ "
>
> _____
> (Signature)

The County implies that this agreement limits the tribunal's consideration of relevant law. As illustrated by the written

opinion of the hearing tribunal in the instant case citing numerous federal decisions no such limitation exists. The above agreement includes a promise to apply Commission regulations. These regulations include WAC 162-08-278(7):

> In determining whether unfair practices have been committed, the hearing tribunal shall apply the law as it is written in chapter 49.60 RCW and as it has been interpreted by final decisions of appellate courts and by the Washington State Human Rights Commission in regulations, declaratory rulings, and other formal interpretations made by vote of the commissioners. Court decisions interpreting statutes other than chapter 49.60 RCW, rulings of other hearing tribunals, interpretations of law by the commission's staff or legal counsel, and arguments of legal counsel for the commission or other parties shall be given whatever persuasive weight they possess, in the judgment of the tribunal.

The County also implies that WAC 162-08-211(6) allows the tribunal to ignore constitutional guaranties. As previously addressed, due process rights are

emphasized and ensured by the Commission procedures. The failure to include a declaration of support for federal and state constitutions, as apparently sought by the County does not violate the guaranty of a fair hearing, especially since the tribunal, as an administrative agency, has no authority to determine the constitutionality of the law it administers. Bare v. Gorton, 84 Wn.2d 380, 526 P.2d 379 (1974).

The guarantee of a fair hearing does not prohibit partiality toward an issue of law or a policy. "A prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification." 3 K. Davis, Administrative Law, sec. 19:1, at 371 (2d ed. 1980). In explaining his reason for not disqualifying himself from a spe-

cific case based upon his prior position on a similar issue while he worked for the Department of Justice, Justice Rehnquist state in Laird v. Tatum, 409 U.S. 824, 834-35, 34 L.Ed.2d 50, 90 S.Ct. 7 (1972):

> Mr. Justice Douglas' statement about federal district judges in his dissenting opinion in Chandler v. Judicial Council, 398 U.S. 74, 137 [26 L. Ed.2d 100, 90 S. Ct. 1648] (1970), strikes me as being equally true of the Justices of this Court:
>
> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."
>
> Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpreta-

> tion of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Similarly, in this case, a willingness to apply the Law Against Discrimination, and a promise to be fair and impartial to all parties and persons did not violate the County's right to a fair hearing. See also Skold v. Johnson, 29 Wn. App. 541, 630 P.2d 456 (1981).

Another assertion made by the County is that Sellers' claim is fatally deficient in that she did not make formal application for the job. We disagree. It is Hornbook law that the law does not require a useless act. The evidence is not disputed that Sellers called and was told that only men were being considered for

the job. The Sheriff himself confirmed this by letter to the Human Rights Commission shortly thereafter. The Sheriff testified that although he preferred a man he might have hired Sellers if no equally qualified man was available. At the time of the incident at issue, Sellers had a bachelor's degree in sociology and psychology and was close to completing a master's program in guidance and counseling. She had many years of teaching and counseling experience, including work with migrant workers in the Pasco area and some teaching experience with work release inmates. In fact, the Sheriff testified that he had not expected to attract anyone of Sellers' qualifications to apply for the position.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), sets out the four require-

ments of a prima facie case of discrimination: (1) plaintiff is a member of a suspect, or protected class, (2) plaintiff applied and was qualified for a job for which the employer was seeking applicants, (3) that despite plaintiff's qualifications s/he was rejected, (4) that after rejecting plaintiff, the job remained open and the employer continued to seek applicants with plaintiff's basic qualifications.

As stated in WAC 162-30-010, the state law on discrimination will be interpreted by reference to the federal law when not in conflict. See Lindsay v. Seattle, 86 Wn.2d 698, 548 P.2d 320 (1976); Fahn v. Cowlitz County, 93 Wn.2d 368, 610 P.2d 857 (1980); Rose v. Hanna Minning Co., 94 Wn.2d 307, 616 P.2d 1229 (1980). Although we accept McDonnell Douglas as good law, technical compliance with ele-

ment (2) would defeat the purpose of RCW 49.60, which is to be liberally construed to effectuate its purpose to prohibit unlawful discrimination. "[W]here an employer's acts deter [plaintiff] from applying, strict adherence to the 'application' requirement is not mandated." Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency, 304 N.W. 2d 443, 451 (Iowa Ct. App. 1981), citing State Comm'n for Human Rights v. Yellow Cab, 611 P.2d 487, at 491 (Alaska 1980). See also Arnett v. Seattle Gen. Hosp., 65 Wn.2d 22, 395 P.2d 503 (1964).

We reverse the Court of Appeals and uphold the trial court's affirmance of the findings, conclusions and damages awarded by the tribunal.

s/Dimmick, J.

we concur:
s/ Brachtenback, C.J.
s/ Rossellini, J
s/ Stafford, J.
s/ Utter, J.
s/ Williams, J.
s/ Dore, J.
s/ Dolliver, J.

BEFORE THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

BETTY P. SELLERS, Complainant,	)	No. P-41-74
vs-	)	
FRANKLIN COUNTY SHERIFF'S OFFICE, Respondent.	)	ORDER OF HEARING TRIBUNAL

The hearing tribunal, duly appointed in this cause, having rendered its written decision, and having made Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED THAT RESPONDENT:

1. Cease and desist from refusing to hire Complainant Betty Sellers or any other woman for work release counseling or any similar position, even if Respondent deems it prefereble to have one counselor of each sex, unless subsequent to this opinion, such position is declared by the Commission to have BFOQ status pursuant to WAC 162-16-020, -030, and

-040, under the procedures of WAC 162-08-700.

2. Respondent shall pay to Betty Sellers the total sum of $7,200 in back pay, representing wages she would have earned at the rate of $600 per month from June 21, 1974 through June 18, 1975. Any and all benefits incident to such employment shall also be paid to Sellers for the above period.

3. Further, the Tribunal orders Respondent to offer to hire Betty Sellers for the first available work release counseling position, or any similar position, whether the job is funded through CETA monies, the regular County budget, or through any other means. Sellers shall be given notice of said offer by registered mail, copy to the Washington State Human Rights Commission, 1601 Second Avenue Building, Seattle, Washington, 198101,

and she shall have ten days in which to either accept or reject the Respondent's offer in the same manner. In the event that Sellers refuses to accept Respondent's first offer of employment, she shall be similarly notified of all future vacancies for such positions, and be given the right of first refusal for such positions for a period of two years from the date of our Opinion. Copies of said notifications shall also be mailed to the Commission. Sellers shall have ten days in which to either accept or reject these positions as well.

4. Any position which Betty Sellers chooses to reject shall be advertised in a local publication of daily or weekly circulation and through the Pasco Office of the Employment Security Department. Applicants shall be considered without regard to sex or any other protected

classification defined under RCW 49.60. 180, and the Commission shall be promptly notified of the name, address and sex of each individual hired.

5. Respondent shall have thirty days from the entry of this order to submit to the Commission written criteria for the evaluation of applicants for work release counseling (or similar) positions. The Commission shall have ten days thereafter within which to file objections with this Tribunal regarding said proposed criteria. If no objection is made, the Tribunal will approve entry of an order implementing such criteria. If counsel for the Commission object to the proposed criteria, this Tribunal will promptly hold a hearing and rule on the adequacy thereof.

Jurisdiction of the above entitled matter shall be retained by the Tribunal

until the above remedies have been implemented.

In the event that the functions of the Franklin County Work Release Program are transferred from the Sheriff's Office to some other County department, the terms of the above order shall apply to that department.

It is so ordered

s/Mary Ann Ottinger
Mary Ann Ottinger, Tribunal Chairperson

s/Robert Aronson
Robert Aronson, Tribunal Member

s/J. Nelson Judy
Dr. J. Nelson Judy, Tribunal Member

Presented by:
s/G. Saxon Rodgers
G. SAXON RODGERS, Assistant Attorney General, Attorney for the Washington State Human Rights Commission

SUPREME COURT OF THE UNITED STATES

NO. A-286

FRANKLIN COUNTY SHERIFF'S OFFICE

Petitioner,

v.

BETTY P. SELLERS AND WASHINGTON STATE HUMAN RIGHTS COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 1, 1982.

s/William H. Rehnquist
Associate Justice of the Supreme Court of the United States

Dated this 21st day of September, 1982

Appendix No. 6

BEFORE THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

BETTY P. SELLERS, Complainant,	)	NO. P-41-74
v-	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW OF HEARING TRIBUNAL
FRANKLIN COUNTY SHERIFF'S OFFICE, Respondent.	)	

This matter came on regularly for hearing on October 13 and 14, 1977, in Pasco, Washington. Complainant Betty P. Sellers was present and unrepresented by counsel. Respondent Franklin County Sheriff's Office appeared by and through its counsel, George E. Heidlebaugh, Deputy Prosecuting Attorney. Franklin County Sheriff Richard E. Boyles was present and represented by Stanley Taylor, of Peterson, Taylor, Day & Shea. The Washington State Human Rights Commission was represented by G. Saxon Rodgers, Assistant Attorney General.

Testimony having been heard, exhibits having been received, the hearing tribunal having considered the evidence, arguments of counsel, and having rendered its written decision dated 28 November 1977, the tribunal hereby makes the following:

FINDINGS OF FACT

1. On or about June 21, 1974, the Complainant, Betty P. Sellers, was referred to the Franklin County Sheriff's Office by the Pasco office of the Washington State Department of Employment Security.

2. Sellers was told by Mr. Manuel G. Rodriguez of Employment Security, that there was an opening at the Sheriff's Office for a Work Release Counselor for which, in his opinion, Sellers was qualified.

3. Sellers contacted Shirley Bill-

ingsley, Work Release Director, indicated she had been referred by Rodriguez, and inquired of Billingsley of the Counselor position.

4. Billingsley admitted to Sellers that there was, in fact, a Counselor position available, but that they "wanted a man" to fill it.

5. When Sellers inquired as to the reason for the "male" sex qualification, Billingsley told Sellers that Sheriff Boyles felt they "needed a man."

6. Shirley Billingsley acted as an agent of, and upon the instructions of Sheriff Richard Boyles, when she was contacted by Sellers.

7. Sellers attempted to apply for the Counselor position in the Franklin County Sheriff's Office that in fact existed on or about June 21, 1974.

8. Sellers was qualified for the Counselor position that was available

in the Sheriff's Office in June of 1974.

9. Sellers was refused the opportunity to apply for the available Counselor position because of her sex.

10. Sellers was damaged when she was refused the opportunity to apply for the Counselor position because of her sex.

11. Sellers filed a complaint with the Washington State Human Rights Commission which alleged sex discrimination in employment against the Franklin County Sheriff's Office.

12. Franklin County entered into a contract with Employment Security which provided for a Counselor position from June 1, 1974 to August 15, 1974, and which was to be funded by unexpended EEA funds. This Counselor position was the position in the Sheriff's Office for which Sellers was referred by Employment Security.

13. Franklin County entered into a

subsequent contract with Employment Security which extended the Counselor position for another ten and one-half months, and which was to be funded by CETA monies.

14. The Counselor position within the Sheriff's Office was not filled because Sellers filed a complaint with the Washington State Human Rights Commission.

15. Shirley Billingsley, a woman, has performed the job of Counselor in the Sheriff's Office for over four years, and has done an excellent job.

16. No credible evidence was presented to show that women as a class cannot perform the functions of a Counselor in the Work Release Section of the Sheriff's Office.

17. The employment of a male Counselor is not necessary for the successful implementation of the Franklin County Work Release Program, but is merely a preference or convenience.

18. The Washington State Human Rights Commission investigated the complaint of Betty P. Sellers and made a finding that there was reasonable cause to believe that sex discrimination in employment had taken place, in accordance with RCW 49.60.240.

19. The Washington State Human Rights Commission attempted to eliminate the unfair practice by conference, conciliation and persuasion, in accordance with RCW 49.60.240.

CONCLUSIONS OF LAW

1. The hearing tribunal has jurisdiction over the parties pursuant to RCW 49.60.230, .240, and .250.

2. Respondent committed an unfair practice in employment because of sex within the meaning of RCW 49.60.180(1).

3. Being of the male sex is not a bona fide occupational qualification for the position of Counselor, in the

Work Release Section of the Franklin County Sheriff's Office.

4. Betty P. Sellers is entitled to seventy-two hundred dollars ($7,200) in back pay and all benefits incident to employment in the Sheriff's Office, for the period June 21, 1974 through June 18, 1975.

INCORPORATION OF WRITTEN DECISION

Statements of fact and law made in the written decision of the hearing tribunal supplement and explain these findings of Fact and Conclusions of Law.

DATED this 3rd day of January, 1978.

s/Mary Ann Ottinger
Mary Ann Ottinger
Tribunal Chairperson

s/Robert Aronson
Robert Aronson
Tribunal Member

s/J. Nelson Judy
Dr. J. Nelson Judy
Tribunal Member

Presented by:
s/G. Saxon Rodgers
G. SAXON ROGERS
Assistant Attorney General, Attorney for the Washington State Human Rights Com.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FRANKLIN COUNTY SHERIFF'S OFFICE, Petitioner,	NO. 23165
vs- BETTY P. SELLERS, Complainant; WASHINGTON STATE HUMAN RIGHTS COMMISSION, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

This appeal was heard on 15 June 1978. The Franklin County Sheriff's Office was represented by George E. Heidlebaugh, Deputy Prosecuting Attorney, Franklin County. Richard E. Boyles, Intervenor, was represented by Stanley D. Taylor. The Washington State Human Rights Commission was represented by G. Saxon Rodgers, assistant attorney general. The court heard oral argument from all counsel. The court has read the entire record of the tribunal hearing, includ-

ing the transcript of testimony. The court has read the briefs of the parties and has done independent research of the law. The court gave its oral opinion on 6 October 1978, and now enters its Findings of Fact, Conclusions of Law, and Judgment.

FINDINGS OF FACT

1. No Issue of Fact. This review of an administrative contested case was conducted on the record of the hearing before the Human Rights Commission hearing tribunal. The court did not receive original evidence and did not itself try any issues of fact. The Court ruled that review shall be confined to the record (WAS)

CONCLUSIONS OF LAW

1. Nature of Proceedings. This proceeding is a review under RCW 34.04.130 of a contested case conducted by a hearing tribunal of the Washington State Human Rights Commission under RCW 49.60.250.

2. No Violation of Constitution. The proceeding and order of the hearing tribunal did not violate any constitutional provisions. Specifically:

(a) Selection of Tribunal. The manner of selecting tribunal members does not violate any constitutional provision.

(b) Acceptance of Appointment Form. The form of acceptance of appointment and responsibilities required by WAC 162-08-211(6) and signed by the tribunal members in this case does not violate any constitutional provision.

3. Within Statutory Authority and Jurisdiction. Nothing done by the Human Rights Commission or the hearing tribunal was in excess of statutory authority or of the jurisdiction of the Commission and tribunal.

4. No Unlawful Procedure. The procedure followed below was in compliance with the governing statutes was not un-

lawful. Specifically:

(a) Findings Made. The "recommended" findings of investigator were adopted and acted upon by the Commission's staff and are in compliance with RCW 49.60.240.

(b) Other Steps Taken. The other statutory steps prior to hearing were properly taken.

(c) No Denial of Appearance of Fairness. Nothing indicates any violation of the appearance of fairness doctrine.

5. No Other Error of Law. The proceeding below was not affected by any other error of law. Specifically, the tribunal did not err in concluding that being male was not a bona fide occupational qualification for the job at issue (tribunal conclusion of law number 3).

6. Not Clearly Erroneous. The findings of fact of the hearing tribunal are not clearly erroneous in view of the entire record and the public policy contained in the law against dis-

crimination. The findings of fact of the hearing tribunal are:

1. On or about June 21, 1974, the Complainant, Betty P. Sellers, was referred to the Franklin County Sheriff's Office by the Pasco Office of the Washington State Department of Employment Security.

2. Sellers was told by Mr. Manuel G. Rodriguez of Employment Security, that there was an opening at the Sheriff's Office for a Work Release Counselor for which, in his opinion, Sellers was qualified.

3. Sellers contacted Shirley Billingsley, Work Release Director, indicated she had been referred by Rodriguez, and inquired of Billingsley of the Counselor position.

4. Billingsley admitted to Sellers that there was, in fact, a Counselor position available, but that they "wanted a man" to fill it.

5. When Sellers inquired as to the reason for the "male" sex qualification, Billingsley told Sellers that Sheriff Boyles felt they "needed a man."

6. Shirley Billingsley acted as an agent of, and upon the instructions of Sheriff Richard Boyles, when she was contacted by Sellers.

7. Sellers attempted to apply for

the Counselor position in the Franklin County Sheriff's Office that in fact existed on or about June 21, 1974.

8. Sellers was qualified for the Counselor position that was available in the Sheriff's Office in June of 1974.

9. Sellers was refused the opportunity to apply for the available Counselor position because of her sex.

10. Sellers was damaged when she was refused the opportunity to apply for the Counselor position because of her sex.

11. Sellers filed a complaint with the Washington State Human Rights Commission which alleged sex discrimination in employment against the Franklin County Sheriff's Office.

12. Franklin County entered into a contract with Employment Security which provided for a Counselor position from June 1, 1974 to August 15, 1974, and which was to be funded by unexpended EEA funds. This counselor position was the position in the Sheriff's Office for which Sellers was referred by Employment Security.

13. Franklin County entered into a subsequent contract with Employment Security which extended the Counselor position for another ten and one-half months, and which was to be

funded by CETA monies.

14. The Counselor position within the Sheriff's Office was not filled because Sellers filed a complaint with the Washington State Human Rights Commission.

15. Shirley Billingsley, a woman, has performed the job of Counselor in the Sheriff's Office for over four years, and has done an excellent job.

16. No credible evidence was presented to show that women as a class cannot perform the functions of a Counselor in the Work Release Section of the Sheriff's Office.

17. The employment of a male Counselor is not necessary for the successful implementation of the Franklin County Work Release Program, but is merely a preference or convenience.

18. The Washington State Human Rights Commission investigated the complaint of Betty P. Sellers and made a finding that there was reasonable cause to believe that sex discrimination in employment had taken place, in accordance with RCW 49.60.240.

19. The Washington State Human Rights Commission attempted to eliminate the unfair practice by conference, conciliation and persuasion, in accordance with RCW 49.60.240.

Specifically:

(a) Job Existed: The statement in Finding of Fact 7 that a job opening existed when Ms. Sellers applied is not clearly erroneous. It is supported by persuasive evidence.

(b) Job Refused. The statement in Findings of Fact 7 and 9 that Ms. Sellers attempted to apply for the job and was refused are not clearly erroneous; they are amply supported by the evidence.

(c) Refusal Unfair. The statement in Finding of Fact 9 that Ms. Sellers was refused the opportunity to apply for the position because of her sex is not clearly erroneous. The tribunal's conclusion that the "threshold" refusal is an unfair practice under RCW 49.60.180(1) is not clearly erroneous or otherwise an error of law; it is correct. "No formal written application was filed

with the Sheriff's Office." (WAS)

7. Not Arbitrary or Capricious. Nothing in the administrative findings, inferences, conclusions, or decisions is arbitrary or capricious.

8. Remedies are Lawful. The remedies in the Order of Hearing Tribunal are within the tribunal's scope of authority to fashion remedies, and are not subject to reversal by this court under RCW 34.04.130(6). Specifically:

(a) Amount of Money Award. The tribunal's computation of the money award on the basis of one year's pay is supported by the facts and is not clearly erroneous or otherwise reversable under RCW 34.04.130(6).

(b) Mitigation. Since the unfair practice in this case was intentional, Ms. Sellers had no duty to mitigate damages. Even if there were a duty to miti-

gate, the burden was on the Sheriff's Office to show that jobs Ms. Sellers could fill were available, and no such showing was made.

9. Summation. The findings, inferences, conclusions, and order of the hearing tribunal are not subject to reversal by this court under the applicable law, RCW 34.04.130(6). They are within the intent of the law against discrimination and Equal Rights Amendment.

10. Ultimate Conclusion. The Findings of Fact, Conclusions of Law and Order of hearing tribunal should be affirmed and the Order should be enforced, pursuant to RCW 49.60.270.

JUDGMENT

IT IS ORDERED AND ADJUDGED that:

1. Affirmed. The Findings of Fact, Conclusions of Law and Order of the hearing tribunal are affirmed.

2. Enforced. The Franklin County Sheriff's Office shall comply with the Order of the hearing tribunal, as follows:

1. Cease and desist from refusing to hire Complainant Betty Sellers or any other woman for work release counseling or any similar position, even if Respondent deems it preferable to have one counselor of each sex, unless subsequent to this opinion, such position is declared by the Commission to have BFOQ status pursuant to WAC 162-16-020, -030, and -040, under the procedures of WAC 162-08-700.

2. Respondent (FCSO) shall pay to Betty Sellers the total sum of $7,200 in back pay, representing the wages she would have earned at the rate of $600 per month from June 21, 1974 through June 18, 1975. Any and all benefits incident to such employment shall also be paid to Sellers for the above period.

3. Further, the tribunal orders Respondent to offer to hire Betty Sellers for the first available work release counseling position, or any similar position, whether the job is funded through CETA monies, the regular County budget, or through any other means. Sellers shall be given notice of said offer by registered mail, copy to the Washington State Human Rights Commission, 1601 Second Avenue Build-

ing, Seattle, Washington, 98101, and she shall have ten days in which to either accept or reject the Respondent's offer in the same manner. In the event that Sellers refuses to accept Respondent's first offer to employment, she shall be similarly notified of all future vacancies for such positions, and be given the right of first refusal for such positions for a period of two years from the date of our Opinion. Copies of said notifications shall also be mailed to the Commission. Sellers shall have ten days in which to either accept or reject these positions as well.

4. Any position which Betty Sellers chooses to reject shall be advertised in a local publication of daily or weekly circulation and through the Pasco Office of the Employment Security Department. Applicants shall be considered without regard to sex or any other protected classification defined under RCW 49.60.180, and the Commission shall be promptly notified of the name, address and sex of each individual hired.

5. Respondent (FCSO) shall have thirty days from the entry of this order to submit to the Commission written criteria for the evaluation of applicants for work release counseling (or similar) positions. The Commission shall have ten days thereafter within which to file objections with this Tribunal regarding said

ing, Seattle, Washington, 98101, and she shall have ten days in which to either accept or reject the Respondent's offer in the same manner. In the event that Sellers refuses to accept Respondent's first offer to employment, she shall be similarly notified of all future vacancies for such positions, and be given the right of first refusal for such positions for a period of two years from the date of our Opinion. Copies of said notifications shall also be mailed to the Commission. Sellers shall have ten days in which to either accept or reject these positions as well.

4. Any position which Betty Sellers chooses to reject shall be advertised in a local publication of daily or weekly circulation and through the Pasco Office of the Employment Security Department. Applicants shall be considered without regard to sex or any other protected classification defined under RCW 49.60.180, and the Commission shall be promptly notified of the name, address and sex of each individual hired.

5. Respondent (FCSO) shall have thirty days from the entry of this order to submit to the Commission written criteria for the evaluation of applicants for work release counseling (or similar) positions. The Commission shall have ten days thereafter within which to file objections with this Tribunal regarding said

proposed criteria. If no objection is made, the Tribunal will approve entry of an order implementing such criteria. If counsel for the Commission object to the proposed criteria, this Tribunal will promptly hold a hearing and rule on the adequacy thereof.

Jurisdiction of the above entitled matter shall be retained by the Tribunal until the above remedies have been implemented.

In the event that the functions of the Franklin County Work Release Program are transferred from the Sheriff's Office to some other County department, the terms of the above shall apply to that department.

DATED this 12th day of January, 1979.

s/Walter A. Stauffacher
WALTER A. STAUFFACHER
JUDGE

Presented by:
s/Morton M. Tytler
Morton M. Tytler
Senior Assistant Attorney
General, Attorney for the Washington
State Human Rights Commission

THE SUPREME COURT OF WASHINGTON

Franklin County Sheriff's Office, Petitioner,	)	No. 47613-6
v.	)	ORDER DENYING MOTION FOR RECONSIDERATION
BETTY P. SELLERS, ET AL, Respondents.	)	

The Court having unanimously decided that petitioner's motion for reconsideration should be denied,

It is ordered that the motion be and it hereby is denied.

Dated this 29th day of June, 1982.

s/Robert F. Brachtenbury
Chief Justice

97 Wn.2d 317

Appendix No. 10

34.04.130(5) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the agency;

or

(c) made upon unlawful procedure; or

(d) affected by other error or law; or

(e) clearly erroneous in view of the entire record as submitted and the public policy contained in the act of the legislature authorizing the decision or order; or

(f) arbitrary or capricious.

(1977 ex.s. c 52 sec 1; 1967 c 237 sec. 6; 1959 c 234 sec 13.)

RCW 49.60.010 Purpose of chapter. This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers

with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical handicap; and the board established hereunder is hereby given general jurisdiction and power for such purposes.

RCW 49.60.040 Definitions. As used in this chapter:

"Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperative, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof;

"Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit;

"Employee" does not include any individual employed by his or her parents, spouse,

or child, or in the domestic service of any person;

"Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment;

"Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer;

"National origin" includes "ancestry";

"Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement,

without acts directly or indirectly causing persons of any particular race, creed, color, or with any sensory, mental, or physical handicap, or a blind or deaf person using a trained dog guide, to be treated as not welcome, accepted, desired, or solicited;

"Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services,

or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps; Provided, That nothing contained in this definition shall be construed to include or apply to

any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution;

"Real property" includes buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein;

"Real estate transaction" includes the sale, exchange, purchase, rental, or lease of real property.

"Credit transaction" includes any open

or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service, finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred."

RCW 49.60.180 Unfair practices of employer defined. It is an unfair practice for any employer:

(1) To refuse to hire any person because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification: Provided, That the prohibition against discrimination because of such handicap shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap.

(3) To discriminate against any person in compensation or in other terms or con-

ditions of employment because of such person's age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap: Provided, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the board by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which

expresses any limitation, specification, or discrimination as to age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical handicap, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: Provided, Nothing contained herein shall prohibit advertising in a foreign language.

RCW 49.60.250 Hearing of complaint by tribunal -- Order. (Effective until enactment of 1981 c 67.) In case of failure to reach an agreement for the elimination of such unfair practice, and upon the entry of findings to that effect, the entire file, including the complaint and any and all findings made, shall be certified to the chairman of the board. The chairman of the board shall thereupon appoint a hearing tribunal of three persons, who shall be members of the board or a panel of hearing examiners, acting in the name of the board, to hear the complaint and shall cause to be issued and served in the name of the board a written notice, together with a copy of the complaint, as the same may have been amended, requiring the respondent to answer the charges of the complaint at a hearing before such tribunal, at a time and place to be specified in

such notice.

The place of any such hearing may be the office of the board or another place designated by it. The case in support of the complaint shall be presented at the hearing by counsel for the board: Provided, That the complainant may retain independent counsel and submit testimony and be fully heard. No member or employee of the board who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case. Any endeavors or negotiations for conciliation shall not be received in evidence.

The respondent may file a written answer to the complaint and appear at the hearing in person or otherwise, with or without counsel, and submit testimony

and be fully heard.

The tribunal conducting any hearing may permit reasonable amendment to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

If, upon all the evidence, the tribunal finds that the respondent has engaged in any unfair practice it shall state its findings of fact and shall issue and file with the board and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the

tribunal, will effectuate the purposes of this chapter, and including a requirement for report of the matter on compliance.

If, upon all the evidence, the tribunal finds that the respondent has not engaged in any alleged unfair practice, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint.

The board shall establish rules of practice to govern, expedite and effectuate the foregoing procedure.

RCW 49.60.250 Hearing of complaint by administrative law judge -- Order. (Effective upon enactment of 1981 c 67.)

In case of failure to reach an agreement for the elimination of such unfair practice, and upon the entry of findings to that effect, the entire file, including the complaint and any and all findings made, shall be certified to the chairman of the board. The chairman of the board shall thereupon request the appointment of an administrative law judge under Title 34 RCW to hear the complaint and shall cause to be issued and served in the name of the board a written notice, together with a copy of the complaint, as the same may have been amended, requiring the respondent to answer the charges of the complaint at a hearing before the administrative law judge, at a time and place to be specified in such notice.

The place of any such hearing may be the office of the board or another place designated by it. The case in support of the complaint shall be presented at the hearing by counsel for the board: Provided, that the complainant may retain independent counsel and submit testimony and be fully heard. No member or employee of the board who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the administrative law judge in such case. Any endeavors or negotiations for conciliation shall not be received in evidence.

The respondent may file a written answer to the complaint and appear at the hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard. The respondent has

the right to cross-examine the complainant.

The administrative law judge conducting any hearing may permit reasonable amendment to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

If, upon all the evidence, the administrative law judge finds that the respondent has engaged in any unfair practice, the administrative law judge shall state findings of fact and shall issue and file with the board and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other

action as, in the judgment of the administrative law judge, will effectuate the purposes of this chapter, and including a requirement for report of the matter on compliance.

If, upon all the evidence, the administrative law judge finds that the respondent has not engaged in any alleged unfair practice, the administrative law judge shall state findings of fact and shall similarly issue and file an order dismissing the complaint.

An order dismissing a complaint may include an award of reasonable attorneys' fees in favor of the respondent if the administrative law judge concludes that the complaint was frivolous, unreasonable, or groundless.

The board shall establish rules of practice to govern, expedite and effectuate the foregoing procedure.

WAC 162-08-072 Complaints issued by commission. (1) Who may Initiate. Complaints issued by the commission under RCW 49.60.230(2) may be initiated by the commissioners or by the executive secretary personally.

(2) By Commissioners. Initiation of a complaint by the commissioners shall be by motion at a meeting. The executive secretary shall transcribe a carried motion from the minutes onto a paper designated "Complaint", attest it with a signature, and process it.

(3) By Executive Secretary. The executive secretary may initiate a commission complaint by personally signing a document saying that the commission has reason to believe that the person shown as respondent has been engaged or is engaged in an unfair practice, identifying the nature of the unfair practice. The executive secretary shall

notify each commissioner in advance of issuing a complaint, or if advance notice is not possible because of an emergency, or because a commissioner cannot be reached, or for other reason, the executive secretary shall give the notice as soon after issuing the complaint as possible. Any commissioner may have placed on the agenda of the next commission meeting the question of whether the complaint shall stand. If this is done, the commissioner shall vote to sustain or rescind the complaint, after such debate and deliberation as is appropriate, but without taking testimony, or hearing arguments or reports from anyone but commissioners and staff, except as the commission by vote may direct.

(4) Basis for Commission Complaint. A commission complaint may be issued when the commission "has reason to believe that any person has been engaged

in an unfair practice". RCW 49.60.230(2). The basis of belief for a complaint is different from the basis for a finding under RCW 49.60.240 of "reasonable cause for believing that an unfair practice has been or is being committed". The finding of reasonable cause or not is based on the commission's own investigation and ascertainment of facts after receipt of a complaint. The basis of belief for the purpose of initiating a commission complaint is information from any source sufficient, in the judgment of the commission, to justify an investigation and finding of whether or not there is reasonable cause for believing that an unfair practice has been or is being committed. [Order 35, sec. 162-08-072, filed 9/2/77.]

WAC 162-08-201 PREHEARING AMENDMENT OF COMPLAINT. (1)CONTENTS. Upon entry of a finding that no agreement can be reached for the elimination of an unfair practice reasonably believed to have been committed, counsel for the board shall prepare an amended complaint, in the form provided by these rules for pleadings in tribunal hearing, containing the following:

(a)A caption identifying the parties as in the original complaint, but with such additions or deletions of parties respondent as is necessary to conform the caption to the body of the amended complaint;

(b)A statement that the board's staff has investigated the matters alleged in the original complaint and has entered a finding of fact that there is reasonable cause to believe that the respondent has

committed or is committing one or more unfair practices.

(c)A statement that the staff has endeavored to eliminate the unfair practice or practices by conference, conciliation and persuasion, and that a finding has been made that no agreement can be reached.

(d)Identification of the unfair practice or practices which the board's staff has found reasonable cause to believe has been or is being committed.

(e)A clear and concise statement of the facts which form the basis for the finding of the board's staff that there is reasonable cause to believe that an unfair practice or practices has been or is being committed, as those facts are known or believed to exist by the staff at the time the amended complaint is

drafted.

(f)A prayer for relief, setting out the terms or substance of the order which the executive secretary believes would be appropriate for the tribunal to enter if the matters alleged in the complaint are proven to be true.

(2)SIGNING. The amended complaint shall be signed by counsel for the board and verified by the executive secretary or a staff member designated by him to verify on his behalf.

(3)INCLUDED IN FILE. The amended complaint shall be included in the file at the time it is certified to the chairman under RCW 49.60.250.

WAC 162-08-211 Appointment of hearing tribunal. (1) When Appointed. When the file has been certified (WAC 162-08-190) and counsel for the commission has prepared an amended complaint for hearing (WAC 162-08-201) the chairperson of the commission shall appoint a hearing tribunal as provided in RCW 49.60.250 and this section.

(2) Qualifications of Tribunal Members. Commissioners are qualified by virtue of their office to serve as tribunal members. A person other than a commissioner who is appointed as a member of a hearing tribunal shall have the following qualifications, in the judgment of the chairperson of the commission:

(a) Agrement with the purposes of the law against discrimination, and the ability and willingness to follow and apply the law against discrimination and the regulations, declaratory rulings,

and other formal interpretations of the law against discrimination made by vote of the commissioners (as distinguished from interpretations of the commission's staff or legal counsel), see WAC 162-08-278(7);

(b) Knowledge of civil rights law, or of the problems with which the law against discrimination is concerned, or of the type of unfair practice alleged, or of the industry, circumstances or situation of the respondent in the case, or of the community or region where the alleged events occurred, or other knowledge or background that will help the person to understand the issues to be considered.

(c) Ability to judge the case fairly, without partiality toward the complainant, counsel for the commission, the respondent, or any other participant in the hearing; and

(d) Willingness to donate the time necessary to fully hear the case and decide it with reasonable promptness.

(3) Sources of Tribunal Members. Any person may volunteer to serve as a hearing tribunal member by submitting in writing to the clerk the person's name, address, and telephone number, and a statement of qualifications, including the matters covered in part (2) of this section. The clerk shall supply blank forms on which to make submissions, and the clerk may assist persons by taking the information orally or by telephone and preparing the form for signature. The clerk shall keep a file of submitted forms, which shall be open to public inspection. The chairperson of the commission shall consult the file when appointing hearing tribunals, but the chairperson shall not be limited to the appointment of persons who have volun-

teered. If the chairperson solicits the service of a person who has not already volunteered, the person shall sign a statement in the form provided by this subsection and file it with the clerk for inclusion in the file with the volunteered names. This paragraph does not apply to commissioners.

(4) Chairperson of Tribunal. The chairperson of each hearing tribunal shall be either a member of the commission or an attorney at law. The chairperson of the commission shall designate one of the members of the hearing tribunal to serve as chairperson of the hearing tribunal. If the chairperson of the tribunal resigns, is removed, or otherwise becomes unable to serve, the chairperson of the commission shall designate another member to serve as chairperson. The designation may be of the new member appointed to take the chairperson's

place, or of another member, if the other member is qualified to serve as chairperson.

(5) Alternative Tribunal Members. The chairperson of the commission may appoint a fourth person as an alternative tribunal member. If a vacancy in tribunal membership other than chairperson occurs prior to the hearing, the alternative member thereupon becomes an active member, whether or not the alternative member has participated in prehearing proceedings. If such a vacancy occurs after commencement of the hearing, the alternative member becomes an active member only if he or she has attended the hearing up to the time when the vacancy occurs.

(6) Acceptance of Appointment and Responsibilities. Each tribunal member shall execute in writing and file with the clerk a document in substan-

tially the following form:

> "I accept appointment as a member of the hearing tribunal which will hear the case captioned above for the Washington State Human Rights Commission.
>
> I certify that, to my knowledge, I have no conflicts of interest which would interfere with my ability to judge fairly and impartially.
>
> I promise to judge this case with fairness and impartiality to all parties and persons.
>
> I agree with the purposes of the law against discrimination and I will follow and apply the law against discrimination and the regulations, declaratory rulings, and other formal interpretations of the law against discrimination made by vote of the commissioners.
>
> I am willing to devote the time necessary to fully hear the case and decide it with reasonable promptness.
>
> Dated _____.
>
> _____
> (Signature)

A person who serves as a hearing tribunal member for several cases may file a single document in similar form but saying instead that the person will

not accept appointment to a case where the person's interests interfere with the person's ability to judge fairly and impartially. The clerk shall file the document for an individual case in the file for the case and shall file a document for more than one case in a separate file under the person's name or, alternatively, in one case file with a copy in the file of each other case on which the person serves.

(7) Vacancies. Vacancies in tribunal membership caused by resignation, disability, removal under WAC 162-08-215, or other cause, and not filled by an alternative tribunal member under part (3) of this section shall be filled through appointment by the chairperson of the commission in the manner provided for appointment of original tribunal members. If filling a vacancy would make

necessary the repetition of a substantial amount of work, the chairperson may leave a vacancy unfilled and the case may proceed before a tribunal of two, as provided in WAC 162-08-278. [Order 35, sec. 162-08-211, filed 9/2/77; Order 33, sec 162-08-211, filed 3/21/77; Order 7, sec. 162-08-211, filed 1/19/68.]

WAC 162-80-212 COMPENSATION AND EXPENSES OF TRIBUNAL MEMBERS.

(1) Compensation. Tribunal chairpersons shall be compensated for their services at the rate of $25.00 per hour and tribunal members other than the chairperson shall be compensated at the rate of $15.00 per hour. Alternate tribunal members shall be compensated at the rate of $15.00 per hour for any time expended in attendance with the tribunal at the direction of the chairperson of the commission.

(2) Travel Expense. Necessary expenses of tribunal members and alternates for travel on tribunal business shall be paid or reimbursed at the rate and in the manner provided for state employees.

(3) Per Diem. Tribunal members

and alternates who are required by their duties to be more than 20 miles away from their homes or regular places of business or work shall be paid per diem in lieu of living expenses at the hourly and daily rate prescribed for state employees, for the time when they leave their homes or regular places of business or work until they return.

(4) Vouchers. Tribunal members and alternates shall be paid upon receipt by the clerk of state invoice vouchers, for compensation, and state travel vouchers, for travel expenses and per diem.

WAC 162-08-215 Removal of tribunal members for cause. (1) Motion Authorized. Any party or attorney for a party may move for the removal of one or more tribunal members or alternates for cause as provided in this section.

(2) Time for Filing. The motion must be filed with the clerk within ten days after the notice of hearing was served on the moving party, except that a motion to remove a tribunal member who has been appointed after the notice of hearing has been served may be filed within ten days after notice of appointment of that tribunal member has been received by the moving party.

(3) To Whom Directed. The motion shall be directed to the chairperson of the commission and filed with the clerk.

(4) Contents of Motion; Affidavits. The motion must state the reason why re-

moval is requested and it must be supported by affidavits that establish the factual basis for the motion, unless the factual basis is of record in the case or is already known to the chairperson. Affidavits must be made on personal knowledge, must set forth facts that are admissible in evidence in an administrative hearing, and must show affirmatively that the affiant is competent to testify to the matters stated in them. Authenticated copies of all papers or parts of papers referred to in an affidavit must be filed with the affidavit, unless they are already on file with the commission or are published and are generally available. If the moving party has reason to believe that evidence in support of the motion exists and the moving party cannot with reasonable diligence obtain the evidence in proper form within the time allowed for filing the mo-

tion, the moving party may make a request in the motion for additional time to submit evidence. The request for additional time must be supported by an affidavit which describes as specifically as possible the evidence and the efforts that have been made and will be made to get it, and the time needed to obtain and file the evidence. The chairperson may grant additional time if the chairperson finds that the described evidence would be usable and helpful in passing on the motion and if the moving party has shown diligence in attempting to get it.

(5) Grounds for Removal. A member of a hearing tribunal shall be removed if the chairperson finds that the motion and supporting affidavits show that the person is disqualified under the law of this state on disqualification of judicial and quasi-judicial officers. Grounds for disqualification include:

(a) Prejudgment concerning issues of fact about parties in the particular case;

(b) Partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party, as distinguished from issues of law or policy;

(c) An interest whereby one stands to gain or lose by a decision either way;

(d) Any interest, pecuniary or not, the probable and natural tendency of which is to create a bias in the mind of the person for or against a party; and

(e) That service of the person would cause the tribunal to appear to a reasonably prudent and disinterested person to lack the appearance of fairness, impartiality, and neutrality.

(6) Ruling on Motion. If the chairperson of the commission finds from the

facts established by the motion and supporting affidavits that the tribunal member is disqualified, the chairperson shall issue an order removing the member from service on the tribunal.

(7) Limitations on Motions. No party and attorney for that party may make more than one motion for removal of the same tribunal member from the same tribunal, and no motion may be made after the tribunal member has made or participated in making any ruling involving discretion.

(8) Disposition of Denied Motions. In order to avoid a possible prejudicial effect on the tribunal member, a ruling denying a motion for removal shall not be revealed to the tribunal or its members by the chairperson or any representative of the commission. Motions and other papers filed under this section shall not be filed in the tribunal's case file or

otherwise revealed to the tribunal or its members by representatives of the commision but shall be included in the record certified to superior court for purposes of appeal or enforcement, as is provided in WAC 162-08-231(5). Tribunal members are directed not to examine files concerning them or the case, other than the tribunal's case file, during pendency of the hearing and are directed not to inquire as to whether a party or attorney has moved for removal of a tribunal member or alternate. Members of the public are requested not to reveal to a tribunal member the fact that a motion for removal has been made and denied. The procedure in this subsection is intended to establish a high standard of fairness, not a minimum standard of fairness. Knowledge by a hearing tribunal member about a motion for his or her removal shall not disqualify

the member from continuing to serve, in the absence of evidence of actual bias arising from special facts. [Order 35, sec. 162-08-215, filed 9/2/77; Order 33, sec. 162-08-215, filed 3/21/77.]

BEFORE THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

BETTY P. SELLERS, Complainant,	)	CAUSE NO. P-41-74
vs-	)	NOTICE TO COMMISSION
FRANKLIN COUNTY SHERIFF'S OFFICE, Respondents.	)	

NOTICE IS HEREBY given that at every stage in the proceedings objection will be made that WAC 162-08-221 [sic 211] (2)(a) and the oath of office for the Tribunal Judges are unconstitutional, in that they do not provide for a fair hearing by unbiased judges or due process in this regard and are not in accordance with law.

The only proper qualification and oath in this regard is to support the Constitution and Laws of the United States

and the State of Washington.

C. J. RABIDEAU
Prosecuting Attorney

By: s/G. Heidlebaugh
George E. Heidlebaugh
Deputy Prosecuting
Attorney, Franklin
County, P. O. Box
1160, Pasco, Washing-
ton 99301
(509) 545-3550

BEFORE THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

BETTY P. SELLERS, Complainant, - vs - FRANKLIN COUNTY SHERIFF'S OFFICE, Respondent.	)	HRC NO. P-41-74 ANSWER

COMES respondent and denies Paragraph I, II, III, IV and V and by way of affirmative defense alleges:

I

That if there is a complaint it should be made against Franklin County and directed to the Commissioners.

II

That there was a bonafide occupational qualification defense.

III

That the Sheriff has no authority to

grant the relief for which relief is prayed.

IV

That no application was ever received. Hence there is no way to determine complainant's qualifications.

V

That funds were not available. The position was never filled.

VI

That Shirley Billingsly had no authority to bid Franklin County or the Sheriff.

VII

That motion is made to conform the pleading to the proof as it may appear at trial.

VIII

That latches have occured in prosecuting this cause justifying dismissal.

IX

That there has been a failure of consideration.

X

That the tribunal is not lawfully or constitutionally constituted.

XI

That the Board is attempting to proceed under Rules it has not been granted authority to adopt.

XII

That the remedy provided in RCW 49.60.030 is exclusive.

XIII

That the Board is attempting to exercise Judicial powers only the Judicial branch can exercise and cannot provide a penalty.

XIV

The Board's attempt to limit the defense in W.A.C. 162.-08-261 is not authorized by R.C.W. 49.60.250.

XV

Discrimination is not defined in the Statute and it is not made illegal anywhere in the Statute. These things may not be delegated to an administrative agency. It is the duty of the legislature to give a standard and by all means it must declare violations of such illegal. This it has not done.

Even were a definition provided, the violation of a civil right as defined in R.C.W. 49.60.030 is not prohibited nor is an unfair practice as defined in R.C.W. 49.60.180 or elsewhere prohibited to this respondent. Constitutional standards of legislation have not been met.

XVI

That the complaint is frivolous because complainant did not proceed far enough to justify complaint.

XVII

Sheriff's employees must be approved by the Sheriff's Civil Service Commission by law before employment.

By way of affirmative relief respondent prays judgment against Betty Sellers for $10,000.00 damages to be proved at trial for loss of time in preparing the defense and for reasonable attorney fees and costs.

Respondent further prays for the same relief against the State Board and the members thereof.

Respondent prays for dismissal of the complaint and for costs and attorney fees.

C.J. RABIDEAU
Prosecuting Attorney

By George E. Heidlebaugh

George E. Heidlebaugh
Deputy Prosecuting
Attorney
Franklin County
P.O. Box 1160
Pasco, Washington

(509) 545-3550
Attorney for
Respondent

BEFORE THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

BETTY P. SELLERS, Complainant,	)	HRC NO. P-41-74
vs-	)	ANSWER [further]
FRANKLIN COUNTY SHERIFF'S OFFICE, Respondent.	)	

Respondent alleges:

A. That as previously stated the panel is not properly qualified since their oath and qualifications are calculated to favor the State Board instead of administering even handed justice. A fair hearing cannot be had.

. . .

The respondent stands on the affirmative defenses [Appendix No. 24.] alleged, . . .

DATED this 13th day of May, 1977.

Respectfully submitted,

C. J. RABIDEAU
Prosecuting Attorney

By: s/G. Heidlebaugh
George E. Heidlebaugh
Deputy Prosecuting
Attorney
Franklin County
P. O. Box 1160
Pasco, Washington 99301

BEFORE THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

BETTY P. SELLERS, Complainant,	)	NO. P-41-74
vs-	)	FINDINGS OF FACT AND CONSIONS OF LAW
FRANKLIN COUNTY SHERIFF'S OFFICE, Respondent.	)	OF HEARING TRIBUNAL

This matter came on regularly for hearing on October 13 and 14, 1977, in Pasco, Washington. Complainant Betty P. Sellers was present and unrepresented by counsel. Respondent Franklin County Sheriff's Office appeared by and through its counsel, George E. Heidlebaugh, Deputy Prosecuting Attorney. Franklin County Sheriff Richard E. Boyles was present and represented by Stanley D. Taylor, of Peterson, Taylor, Day & Shea. The Washington State Human Rights Commission was represented by G. Saxon Rodgers, Assistant Attorney General.

Testimony having been heard, exhibits having been received, the hearing tribunal having considered the evidence, arguments of counsel, and having reconsidered its written decision dated November 28, 1977, the tribunal hereby makes the following:

FINDINGS OF FACT

1. On or about June 21, 1974, the Complainant, Betty P. Sellers, learned there might be an opening for a man as a Work Release Counselor in the Franklin County Sheriff's Office.

2. The Pasco office of the Washington State Department of Employment Security gave her Billingsley's telephone number but no formal referral in the usual way was made. The Washington State Department of Employment Security thought she might be qualified.

3. Sellers contacted Shirley

Billingsley, Work Release Director, by telephone indicating she had been given her name by M.G. Rodriguez of Employment Security, and inquired of Billingsley of the Counselor position. No application was submitted.

4. Billingsley admitted to Sellers that in fact, a Counselor position might become available, but that they "needed a male" to fill it.

5. Sellers did not inquire as to the reason for the "male" sex preference. Billingsley did not tell Sellers that Sheriff Boyles felt they "need a man".

6. Shirley Billingsley acted as an agent of, and upon the instructions of Sheriff Richard Boyles, when she was contacted by Sellers.

7. Sellers made no further attempt to apply for the Counselor position in the Franklin County Sheriff's Office

which might become available.

8. Sellers' qualifications for the Counselor position were never investigated, no personal interview was had and no application or references received.

9. Sellers was not refused the opportunity to apply for the Counselor position because of her sex.

10. Sellers was not damaged by the telephone conversation.

11. Sellers filed a complaint with the Washington State Human Rights Commission which alleged sex discrimination in employment against the Franklin County Sheriff's Office.

12. Franklin County signed a contract with Employment Security which provided for a position from June 1, 1974 to August 15, 1974, and which was to be funded by unexpended EEA funds. There

was no proof that the contract was returned as accepted by Employment Security. No one in the employ of Franklin County knew the contract was for a Counselor position or accepted by the State.

13. Franklin County entered into a subsequent contract with Employment Security for a position for another ten and one-half (10 1/2) months, in the Auditor's office and which was to be funded by CETA monies.

14. The Counselor position within the Sheriff's Office was not filled because Employment Security would not permit it in view of Sellers having filed a complaint with the Washington State Human Rights Commission.

15. Shirley Billingsley, a woman, has performed the job of Counselor in the Sheriff's Office for over four (4) years, and has done an excellent job. She

wanted a man to help her because some prisoners relate to men better than women and one (1) should be available.

16. Credible evidence was presented to show that women as a class can perform the functions of a Counselor in the Work Release Section of the Sheriff's Office, but both sexes should be available as Counselor for the better success of the program.

17. The employment of a male Counselor is necessary for the successful implementation of the Franklin County Work Release Program.

18. The Washington State Human Rights Commission investigated the complaint of Betty P. Sellers but made no finding that there was reasonable cause to believe that sex discrimination in employment has taken place, in accordance with RCW 49.60.240.

19. The Washington State Human Rights Commission attempted to eliminate the alleged unfair practice by conference, conciliation and persuasion, in accordance with RCW 49.60.240.

20. The Judges of Franklin County previously entered into an agreement with the Sheriff's Office that a man and a woman Counselor should exist. Only lack of money prevented this distribution.

21. Shirley Billingsley has been with the program since its inception, is the only employee available and this program has been the prime leader in the field in Washington State. Billingsley feels the further success of the program will be advanced by having a man Counselor. Her advice should be accepted by government for the better control of crime and rehabilitation of criminals. Shirley Billingsley as a

woman has succeeded in a difficult man's world and should be given the help she feels she needs for enhanced success. A woman's success should not be discouraged.

22. No selection of Counselors based on sex would be appropriate where a large office already provided both male and female Counselors for the prisoners, but where only one (1) sex is available it would be discrimination against the unemployed sex not to have both sexes available. Both sexes should be available to prisoners.

23. Ninety percent (90%) of the prisoners are men.

24. Betty Sellers admitted she afterwards made no effort to find other employment and income; therefore she did not minimize her claimed damages. She has not worked since.

25. Sheriff Richard E. Boyles was not personally contacted at the time Sellers made her telephone call, and had no opprotunity to make any decision concerning the telephone call made by Sellers.

26. Neither Billingsley nor anyone in the Sheriff's Office knew that funds were allegedly available for the employment of a Counselor, for the period from June 1, 1974 to August 15, 1974, at the time of the telephone call by Sellers.

27. The law and procedure under which this Tribunal was appointed and acted was unconstitutional under the due process and equal protection clauses, the separation of powers doctrine and the appearance of fairness doctrine of the Washington State and United States Constitutions because the Human Rights Commission appointed and paid the tribu-

nal which heard the case, assessed the penalty, took the complaint, investigated the complaint, made the charge, tried the case and enforces the law. The qualifications for membership in the Tribunal and the oath are likewise unconstitutional for the same reasons.

28. This tribunal is proceeding under rules it is not authorized to adopt.

29. The ultimate decision on employment would be made by the Sheriff and not Billingsley.

30. The Judges of the Superior Court permit a prisoner to participate in work release, have an agreement concerning its management and want a man also on the job. This Tribunal should not and cannot countermand the Judges of the Superior Court of Franklin County.

CONCLUSIONS OF LAW

1. The hearing tribunal has no jurisdiction over the parties pursuant to RCW 49.60.230, .240, and .250, because there was no finding of discrimination.

2. This tribunal is unlawfully and unconstitutionally constituted.

3. The Commission in this case proceeded under rules it is not authorized to adopt.

4. Respondent did not commit an unfair practice in employment because of sex within the meaning of RCW 49.60.180(1).

5. Being of the male sex is a bona fide occupational qualification for the position of Counselor, in the Work Release Section of the Franklin County Sheriff's Office when only a woman is available.

6. Betty P. Sellers is not entitled

to back pay or any benefits incident to employment in the Sheriff's Office, for the period June 21, 1974 through June 18, 1975.

7. The case should be dismissed with prejudice and with costs to Respondent.

8. This Tribunal should not and may not lawfully countermand decisions of the Judges of the Superior Court of Franklin County Concerning the sex of Work Release Counselors in a two (2) person office under their joint general supervison.

DATED THIS _____ day of _____, 19___.

_____
MARY ANN OTTINGER, Tribunal Chairperson

_____
ROBERT ARONSON, Tribunal Member

_____
DR. J. NELSON JUDY, Tribunal Member

s/G. Heidlebaugh
Deputy Prosecuting Attorney
Franklin County
Attorney for Respondent
Franklin County Sheriff's Office

s/Stanley D. Taylor
STANLEY D. TAYLOR of
Peterson, Taylor, Day & Shea
Attorneys for Respondent
Richard Boyles

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF FRANKLIN

BETTY P. SELLERS, Plaintiff, -vs- FRANKLIN COUNTY SHERIFF'S OFFICE, Defendant.	)	NO. 23165

A. The findings of fact of the Tribunal are in substantial error, each finding will be dealt with by its number

. . .

B. The Tribunal should have made the findings of fact in accordance with defendant's attached proposal consisting of thirty (30) findings. These are in accord with the evidence and the law. The proper findings are attached hereto.

. . .

DATED this 12th day of May, 1978.

Respectfully submitted by:

s/G. Heidlebaugh
GEORGE E. HEIDLEBAUGH
Deputy Prosecuting
Attorney
Franklin County

BEFORE THE WASHINGTON STATE HUMAN RIGHTS COMMISSION

Attachment to Appendix #27

BETTY P. SELLERS,	)	NO. P-41-74
Complainant,	)	
vs-	)	FINDINGS OF FACT AND CONSIONS OF LAW
FRANKLIN COUNTY SHERIFF'S OFFICE,	)	OF HEARING TRIBUNAL
Respondent.	)	

This matter came on regularly for hearing on October 13 and 14, 1977, in Pasco, Washington. Complainant Betty P. Sellers was present and unrepresented by counsel. Respondent Franklin County Sheriff's Office appeared by and through its counsel, George E. Heidlebaugh, Deputy Prosecuting Attorney. Franklin County Sheriff Richard E. Boyles was present and represented by Stanley D. Taylor, of Peterson, Taylor, Day & Shea. The Washington State Human Rights Commission was represented by G. Saxon Rodgers, Assistant Attorney General.

Testimony having been heard, exhibits having been received, the hearing tribunal having considered the evidence, arguments of counsel, and having reconsidered its written decision dated November 28, 1977, the tribunal hereby makes the following:

FINDINGS OF FACT

1. On or about June 21, 1974, the Complainant, Betty P. Sellers, learned there might be an opening for a man as a Work Release Counselor in the Franklin County Sheriff's Office.

2. The Pasco office of the Washington State Department of Employment Security gave her Billingsley's telephone number but no formal referral in the usual way was made. The Washington State Department of Employment Security thought she might be qualified.

3. Sellers contacted Shirley

Billingsley, Work Release Director, by telephone indicating she had been given her name by M.G. Rodriguez of Employment Security, and inquired of Billingsley of the Counselor position. No application was submitted.

4. Billingsley admitted to Sellers that in fact, a Counselor position might become available, but that they "needed a male" to fill it.

5. Sellers did not inquire as to the reason for the "male" sex preference. Billingsley did not tell Sellers that Sheriff Boyles felt they "need a man".

6. Shirley Billingsley acted as an agent of, and upon the instructions of Sheriff Richard Boyles, when she was contacted by Sellers.

7. Sellers made no further attempt to apply for the Counselor position in the Franklin County Sheriff's Office

which might become available.

8. Sellers' qualifications for the Counselor position were never investigated, no personal interview was had and no application or references received.

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10. Sellers was not damaged by the telephone conversation.

11. Sellers filed a complaint with the Washington State Human Rights Commission which alleged sex discrimination in employment against the Franklin County Sheriff's Office.

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15. Shirley Billingsley, a woman, has performed the job of Counselor in the Sheriff's Office for over four (4) years, and has done an excellent job. She

wanted a man to help her because some prisoners relate to men better than women and one (1) should be available.

16. Credible evidence was presented to show that women as a class can perform the functions of a Counselor in the Work Release Section of the Sheriff's Office, but both sexes should be available as Counselor for the better success of the program.

17. The employment of a male Counselor is necessary for the successful implementation of the Franklin County Work Release Program.

18. The Washington State Human Rights Commission investigated the complaint of Betty P. Sellers but made no finding that there was reasonable cause to believe that sex discrimination in employment has taken place, in accordance with RCW 49.60.240.

19. The Washington State Human Rights Commission attempted to eliminate the alleged unfair practice by conference, conciliation and persuasion, in accordance with RCW 49.60.240.

20. The Judges of Franklin County previously entered into an agreement with the Sheriff's Office that a man and a woman Counselor should exist. Only lack of money prevented this distribution.

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woman has succeeded in a difficult man's world and should be given the help she feels she needs for enhanced success. A woman's success should not be discouraged.

22. No selection of Counselors based on sex would be appropriate where a large office already provided both male and female Counselors for the prisoners, but where only one (1) sex is available it would be discrimination against the unemployed sex not to have both sexes available. Both sexes should be available to prisoners.

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26. Neither Billingsley nor anyone in the Sheriff's Office knew that funds were allegedly available for the employment of a Counselor, for the period from June 1, 1974 to August 15, 1974, at the time of the telephone call by Sellers.

27. The law and procedure under which this Tribunal was appointed and acted was unconstitutional under the due process and equal protection clauses, the separation of powers doctrine and the appearance of fairness doctrine of the Washington State and United States Constitutions because the Human Rights Commission appointed and paid the tribu-

nal which heard the case, assessed the penalty, took the complaint, investigated the complaint, made the charge, tried the case and enforces the law. The qualifications for membership in the Tribunal and the oath are likewise unconstitutional for the same reasons.

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4. Respondent did not commit an unfair practice in employment because of sex within the meaning of RCW 49.60.180(1).

5. Being of the male sex is a bona fide occupational qualification for the position of Counselor, in the Work Release Section of the Franklin County Sheriff's Office when only a woman is available.

6. Betty P. Sellers is not entitled

to back pay or any benefits incident to employment in the Sheriff's Office, for the period June 21, 1974 through June 18, 1975.

7. The case should be dismissed with prejudice and with costs to Respondent.

8. This Tribunal should not and may not lawfully countermand decisions of the Judges of the Superior Court of Franklin County Concerning the sex of Work Release Counselors in a two (2) person office under their joint general supervison.

DATED THIS _____ day of _____, 19___.

_____
MARY ANN OTTINGER, Tribunal Chairperson

_____
ROBERT ARONSON, Tribunal Member

_____
DR. J. NELSON JUDY, Tribunal Member

s/G. Heidlebaugh
Deputy Prosecuting Attorney
Franklin County
Attorney for Respondent
Franklin County Sheriff's Office

s/Stanley D. Taylor
STANLEY D. TAYLOR of
Peterson, Taylor, Day & Shea
Attorneys for Respondent
Richard Boyles

IN THE SUPREME COURT, STATE OF WASHINGTON

FRANKLIN COUNTY SHERIFF'S OFFICE, Petitioner, -vs- BETTY P. SELLERS, Complainant, WASHINGTON STATE HUMAN RIGHTS COMMISSION, Respondents.	NO. 47613-6 PETITION FOR REVIEW UNDER RAP 13.4

C. J. RABIDEAU, Prosecutor
George E. Heidlebaugh
Deputy Prosecutor
Franklin County
P. O. Box 1160
Pasco, WA 99301
(509) 545-3550
Attorney for Petitioner

KENNETH O. EICKENBERRY
Attorney General
Morton M. Tytler
Senior Assistant Attorney General
Washington State Human Rights Commission
402 Evergreen Plaza Building
Olympia, WA 98504
(206) 753-6770
Attorney for Respondent

C.

ISSUES PRESENTED FOR REVIEW

a. Was the formation and action of the Tribunal herein, and Hearing Tribunals generally in Human Rights Commission proceedings, unconstitutional under the U.S. Constitution, Amendment V and XIV and Washington Constitution Article I, Section 3; Article IV, Section 1.?

b. Was the petitioner provided a fair hearing under the standards established by law?

D.

STATEMENT OF THE CASE

The parts of Appellant's brief relied on are those in Assignment of Error No. 5, pp 6 and 7 and Argument Number 5, subsection a to l inclusive pp 52 to 59 and the brief Amicus Curiae filed herein.

The principles of Fair Hearing, Separation of Powers, and "due process"

under the State and Federal Constitution have been violated.

The Tribunal was unfair and unconstitutional because composed of Judges:

"(a) who gave a special pledge more limiting than that given by the President of the United States; (b) who were appointed case by case without tenure and without standards of appointment legislatively established; (c) who have become experts in advancing the duties of their appointer; (d) who can be dismissed by the appointer; (e) who are so interested, not disinterested, they serve free; (f) who then have their compensation increased very substantially during the pendency of the case before them; and (g) who do all this in disputes between two persons, while serving as advocate for one, - such Judges, as in this case and in this proceeding, do not

have an appearance of fairness to the reasonably prudent and disinterested person."

. . . .

F.

CONCLUSION

Finally, the very system of selecting and appointing the Hearing Tribunal is attacked as unconstitutional because it violates due process and the separation of powers doctrine, and is offensive to the appearance of fairness. It is not necessary for the good of the State to lose such basic elements of Constitutional government, and that in the name of Civil Rights!

The issues raised urgently need resolution. Fair hearings by Administrative Judges should be established. The points here raised are in no way resolved by Rody v. Halles, 81 Wn.2d 88, 500 P.2d

97 (1972) which should be overruled. Significant Constitutional questions are raised involving substantial public interest.

DATED this 7th day of March, 1981.

Respectfully submitted,

C. J. RABIDEAU
Prosecuting Attorney
By: s/ G. Heidlebaugh
George E. Heidlebaugh
Deputy Prosecuting Attorney
Franklin County
618 West Clark
Pasco, Washington 99301
(509) 545-3550

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FRANKLIN COUNTY SHERIFF'S OFFICE,	)	
Petitioner,	)	MANDATE
vs-	)	No. 47613-6
BETTY P. SELLERS,	)	Franklin County
Complainant-Defendant,	)	No. 23165
and	)	
WASHINGTON STATE HUMAN RIGHTS COMMISSION,	)	
Respondent/Cross-Petitioner.	)	

The State of Washington to: The Superior Court of the State of Washington in and for Franklin County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on May 13, 1982, became the decision terminating review of this court in the above entitled case on June 29, 1982. This cause is mandated to the superior court from which the

appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $304.61 in favor of respondent Washington Human Rights Commission and against petitioner.

An Order Denying Motion for Reconsideration was entered herein on June 29, 1982; copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 1st day of July, A.D. 1982

s/Reginald N. Shriver
REGINALD N. SHRIVER, Deputy
Clerk of the Supreme Court,
State of Washington

cl
attachment

cc: Hon. C. J. Rabideau
Franklin Co. Prosecutor
Mr. George E. Heidlebaugh, Deputy

Hon. Kenneth O. Eikenberry
Attorney General
Mr. Morton M. Tytler, Sr. Asst.

Ms. Elizabeth A. Edmonds

Ms. Nancy Preg
Reporter of Decisions

ASSIGNMENT OF ERROR NO. 5

The Superior Court erred in overruling the objection of the Sheriff's Office to the Hearing Tribunal on fair hearing and constitutional grounds, and in ruling that the statutory selection, appointment and acceptance of members of the Tribunal was constitutionally and otherwise acceptable.

ISSUE:

13. Where as in this case a state administrative agency created to carry out the provision of a statute for the protection of civil rights and adjudication thereof between parties received complaints of violation of the statute, investigates the alleged violation, evaluated the facts, determines preliminarily that a violation has or may have occurred, undertakes settlement of the complaint by conciliation, files a formal complaint against the alleged violator,

and prosecutes the complaint through pleading, discovery, hearing and final administrative judgment, does the fact that the same agency further selects, appoints and receives the oath of members of a hearing board or tribunal created to sit as the trier of facts on the complaint, hear the evidence, and determine with administrative finality the liability of the alleged violator, transgress concepts of fair hearing, separation of powers and due process of law and violate the federal and state constitutions in these respects? See U.S. Constitution, Amendments V and XIV as well as Washington State Constitution Article I, Sec. 3; Article IV, Sec. 1.

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-753

In The
SUPREME COURT
Of The UNITED STATES
Winter Term, 1982

FRANKLIN COUNTY SHERIFF'S OFFICE
Petitioner,

v.

BETTY SELLERS
Complainant/Respondent,

and

WASHINGTON STATE HUMAN RIGHTS
COMMISSION
Respondent.

On Appeal from the Supreme Court
of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General

MORTON M. TYTLER
Sr. Asst. Atty. General
Human Rights Division
5th Floor
Highways-Licenses Bldg.
Olympia, WA 98504
206/753-1564

NO. 82-753

In The
SUPREME COURT
Of The UNITED STATES
Winter Term, 1982

FRANKLIN COUNTY SHERIFF'S OFFICE
Petitioner,

v.

BETTY SELLERS
Complainant/Respondent,

and

WASHINGTON STATE HUMAN RIGHTS
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On Appeal from the Supreme Court
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Human Rights Division
5th Floor
Highways-Licenses Bldg.
Olympia, WA 98504
206/753-1564

I. INACCURACIES IN QUESTIONS PRESENTED

The Petitioner's statement of questions presented for review contains the following factual inaccuracies:

A. The tribunal was not "operated" by the Washington State Human Rights Commission.

In Question (i), page 2, of the Petition for Writ of Certioari, the Petitioner states that the administrative hearing tribunal which initially heard this case "was appointed and operated by the Washington State Human Rights Commission."

It is a minor point, but the tribunal was appointed by the Chairperson of the Commission, acting alone. RCW 49.60.250 (prior to enactment of Chapter 67, Laws of

1981), Appendix 15 to Petition for Writ of Certioari, page 1. The Washington State Human Rights Commission is a five-member body. RCW 49.60.050. (The Commission was previously named the "Washington State Board Against Discrimination," RCW 49.60.051, and is still referred to as the "board" in the text of the law against discrimination, Chapter 49.60 RCW.)

The tribunal was not "operated" by the Commission. Tribunals are wholly free of control or influence by the Commission, and are entities separate from the Commission. See Washington Attorney General Letter Opinion 1977 No. 54, Appendix A to this brief, at pages 9 to 14. The Commission does not even have the power to review and

revise the tribunal's decision. The tribunal's decision is final, RCW 49.60.250, subject only to review by courts. See Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 322, 646 P.2d 113, 115-116 (1982), Part I, Appendix 4 to the Petition for Writ of Certiorari, pages 5-10.

B. Tribunals may not act on private knowledge of the facts.

In Question (iii).b., page 2, of the Petition, the Petitioner states that tribunal members "may have private knowledge of the facts."

Tribunal members should not have private knowledge of the facts, and use by a tribunal member of private knowledge of

the facts in deciding the case would be reversible error. RCW 49.60.250 specifies:

> "No member or employee of the [Commission] who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case."

The state administrative procedure act, which governed the hearing, provides:

> "All evidence, including but not limited to records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case."

RCW 34.04.100(2). These laws were implemented by the rules of procedure that

governed this case:

> "Evaluation of Evidence. The tribunal's findings of fact shall be based exclusively on the evidence and on matters officially noticed, but the tribunal members may utilize their experience, technical competence, and specialized knowledge in evaluating the evidence."

WAC 162-08-292(6).

There has never been any suggestion that the tribunal that heard this case had any private knowledge of the facts of the case.

C. Tribunal members could not be dismissed after they had made a ruling involving discretion.

In Question (iii).c., pages 2-3, of the Petition, the Petitioner states that

tribunal members "can be dismissed by the Human Rights Commission."

Tribunal members could not be removed from office except in the following circumstances:

1. A tribunal member could be removed for cause on motion of a party if the motion was made within ten days after the party was notified of the tribunal member's appointment and if the tribunal member had not made any ruling involving discretion. WAC 162-08-215 (Appendix B), particularly paragraphs (1), (2) and (7).

2. The order appointing the three tribunal members could be set aside for procedural error on motion made by an aggrieved party within 15 days after the

party had been served with notice of hearing. WAC 162-08-217 (Appendix C).

Under Washington law, parties must be accorded at least 20 days notice of an administrative hearing. RCW 34.04.090(1).[1]

II. CORRECTION TO PARTIES BELOW

On page 3 of the Petition for Writ of Certiorari, Betty Sellers is listed as a party "Complainant, Respondent."

Betty Sellers has never had the status of a party to this case at any level.

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1 RCW 34.04.090(1) provides: "In any contested case all parties shall be afforded an opportunity for hearing after not less than twenty days' notice;..." This is part of the Washington Administrative Procedure Act, Chapter 34.04 RCW, which applies to this hearing and all others by state agencies that are not specifically exempted. See RCW 34.04.010, 34.04.150.

Mrs. Sellers filed the administrative complaint that commenced the process of administrative fact finding and conciliation, under RCW 49.60.230 and .240. The judicial stage of this case began with the tribunal hearing under RCW 49.60.250. Washington law provides that at the tribunal hearing:

> "The case in support of the complaint shall be presented at the hearing by counsel for the [commission]: Provided, That the complainant may retain independent counsel and submit testimony and be fully heard."

RCW 49.60.250, second paragraph, Appendix 15 to Petition for Writ of Certiorari, page 2.

By Commission rule, a complainant who wants to participate in a tribunal hearing must file a notice of independent appearance. WAC 162-08-261 (Appendix D). Only a complainant who has filed a notice of independent appearance has the status of a party. WAC 162-08-288(1).[2] Betty Sellers did not appear independently. She was satisfied to have the case presented by the Attorney General, as counsel for the Commission. The Attorney General is not counsel for Betty Sellers.

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2 WAC 162-08-288(1) provides: "The parties to the hearing shall be the commission, through its counsel presenting the case in support of the complaint, a complainant who has filed a notice of independent appearance under WAC 162-08-261,..."

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IV. CORRECTION TO STATEMENT OF THE CASE

On page 10 of the Petition for Writ of Certiorari, the Petitioner inaccurately asserts: "The Washington State Human Rights Commission commenced action before itself the Washington State Human Rights Commission."

This quasi-judicial proceeding was commenced by the Human Rights Commission before the hearing tribunal. As we have already pointed out, supra, parts I.A and

C, pages 1 and 5, the tribunal is an entity separate in law and in fact from the Commission.

V. REASONS WHY THE WRIT SHOULD BE DENIED

The writ should be denied because (A) the County's argument is unmeritorious on its face, (B) the state law that the County objects to is no longer in effect, and (C) Franklin County is not entitled to assert the due process clause of the Fourteenth Amendment against the State of Washington.

A. The County's due process argument is unmeritorious on its face.

The Washington Supreme Court responded to the County's due process argument simply by stating that the court had upheld the constitutionality of the tribunal system in

a prior case, Rody v. Hollis, 81 Wn.2d 88, 500 P.2d 97 (1972).[3] In the Rody case, the appellants were private individuals who had standing to raise the due process issue. The County has cited no case from any jurisdiction to the contrary of Rody, and we know of none. In addition, we note that this court has recently held that the similar system of administrative adjudication in New York satisfies due process of law. Kremer v. Chemical Construction Corp., ___ U.S. ___, 72 L.Ed.2d 262, 281-282, 102 S.Ct. 1883, 1898-1899 (1982). See also Hortonville Joint School District No. 1 v. Hortonville

3 97 Wn.2d at 331, 646 P.2d at 120, Appendix 4 to Petition, pages 27-28, text at footnote 3.

Ed. Assn., 426 U.S. 482, 49 L.Ed.2d 1, 96 S.Ct. 2308 (1976) (due process not denied because hearing on disciplining teachers was before same school board that initiated the disciplinary action).

The County's argument is unmeritorious on its face.

B. The statutory provisions alleged to be unconstitutional are no longer in effect. There is no public interest in determining the constitutionality of superseded law.

In rejecting the County's due process argument, the Washington Supreme Court commented:

> "We note that the 1981 legislature has eliminated the provisions that form the basis of

> the County's objections. An administrative law judge appointed by the chief administrative law judge has been substituted for the hearing tribunal appointed by the chairperson of the Commission. Uniform procedure rules promulgated by the chief administrative law judge will supersede Human Rights Commission regulations governing hearing procedures. These statutes will become fully effective on July 1, 1982."

97 Wn.2d at 331, 646 P.2d at 120, Appendix 4 to Petition, page 28, footnote 3. (Citations omitted.)

Washington's new independent Office of Administrative Hearings operates generally to provide administrative law judges for conducting hearings and making proposals for decisions, leaving final decisions to be made by the administering agencies. For

hearings conducted under the law against discrimination, however, the administrative law judge will make the final administrative decision, just as the hearing tribunal did previously. See RCW 49.60.250 as amended in 1981, Appendix 16 to Petition, and our brief, above, part I.A, pages 1 to 3.

There is no public interest in determining the constitutionality of the superseded state law.

C. Franklin County is a political subdivision of the state of Washington and as such has no right to assert the due process clause of the Fourteenth Amendment against the state government.

Franklin County is a political

subdivision of the state of Washington.[4]

The only issue raised in the Petitioner's questions presented for review is whether the state's hearing tribunal system denied the County due process of law under the Fourteenth Amendment of the United States Constitution. Petition for

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4 Washington Constitution, Article XI, §1, reads:

> "Existing counties recognized. The several counties of the Territory of Washington existing at the time of the adoption of this Constitution are hereby recognized as legal subdivisions of this state."

Franklin County was constituted by statute of the Territory of Washington, now codified as RCW 36.04.110: "Franklin county shall consist of the territory bounded as follows..."

Writ of Certiorari, pages 1-3. The County's quarrel is basically with the state legislature, which commanded that the tribunal be appointed and constituted the way it was in this case. Now that the state legislature has changed the law to provide for hearings before administrative law judges not appointed by the prosecuting state agency, the County considers that its "war was won." Petition for Writ of Certiorari, page 13.

The rule of law that disposes of this case is:

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40, 77 L.Ed. 1015, 1020, 53 S.Ct. 431, 432 (1933).

Nothing in Washington state law empowers a county or other municipal corporation to assert federal constitutional rights against the state. See Moses Lake School District No. 161 v. Big Bend Community College, 81 Wn.2d 551, 557, 503 P.2d 86, 91, (1972); Kitsap County v. City of Bremerton, 46 Wn.2d 362, 366, 281 P.2d 841, 844-846 (1955); City of Mountlake Terrace v. Wilson, 15 Wn.App. 392, 549 P.2d 497 (1976).

Franklin County has not been denied any rights, and it has no standing to

litigate the constitutional rights of others.

VI. CONCLUSION

The Petition for Writ of Certiorari should be denied.

DATED this 29th day of November, 1982.

Respectfully submitted,

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OFFICES AND OFFICERS--STATE--
WASHINGTON STATE HUMAN RIGHTS COMMISSION--COMPENSATION FOR SERVICE AS MEMBERS OF HEARING TRIBUNAL

The Washington State Human Rights Commission has the power to compensate persons for service as members of hearing tribunals appointed under the law against discrimination, including members of the commission itself who serve as members of a hearing tribunal in accordance with RCW 49.60.250. However, because of Article III, § 1, (Amendment 54) of the state constitution, the compensation of tribunal members who are also commissioners cannot be increased during their respective terms of office as members of the Human Rights Commission.

- - - - - - - - - - -

November 29, 1977

Honorable Bill W. Hilliard
Executive Secretary
Human Rights Commission
402 Evergreen Plaza Building
Olympia, Washington 98504

Cite as:
AGLO 1977 No. 54

Dear Sir:

By letter previously acknowledged you have requested an opinion of this office on the following questions:

> "1. Does the Washington State Human Rights Commission have the power to compensate persons for service as members of hearing tribunals appointed under the law against discrimination?
>
> "2. If so, can this include members of the commission who serve as members of a hearing tribunal?
>
> "3. Does the executive conflict of interest act, chapter 42.18 RCW, or other law, prevent commissioners from being compensated for service as members of the hearing tribunals?"

We answer your first two questions in the affirmative and your third in the manner set out in our alanysis.

ANALYSIS

By its enactment of the law against discrimination, chapter 49.60 RCW, the legislature created the Washington State Human Rights Commission and gave it "general jurisdiction and power"[1] to eliminate discrimination and prevent unfair practices as defined in the law.[2] One of the authorized means of doing this

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1 See RCW 49.60.010.

2 See RCW 49.60.175-.223.

is to process complaints of unfair practices. If a complaint is not dismissed for lack of "reasonable cause" after investigation or is not settled through conciliation it is then to be administratively adjudicated before a three-member hearing tribunal appointed by the chairman of the commission. This tribunal is to be composed either of "members of the [commission][3] or of a panel of hearing examiners." RCW 49.60.250. In practice, however, you have advised us that:

> ". . . hearing tribunals have been composed of citizen volunteers with commissioners occasionally serving. . . ."

In addition you have informed us that:

> "Tribunal members have been paid per diem (subsistence) and travel expenses pursuant to general statutes (RCW 43.03.050 and .060) but have never been compensated. The reason why tribunal members have never been compensated has been lack of funds for this purpose, not, in the view of the Commission, lack of authority."

---

3 The name of the agency was changed from Washington State Board Against Discrimination to Washington State Human Rights Commission in 1971, RCW 49.60.251, but throughout the text of the chapter it is still called the "board." For clarity, we have substituted "commission" in quotations from the chapter.

In response to a request from the commission, however, the 1977 legislature included funds for compensating tribunal members in the state budget for the 1977-79 biennium. The commission, then, in July, adopted the following regulation:

> "WAC 162-08-212 COMPENSATION AND EXPENSES OF TRIBUNAL MEMBERS. (1) Compensation. Tribunal chairpersons shall be compensated for their services at the rate of $25.00 per hour and tribunal members other than the chairperson shall be compensated at the rate of $15.00 per hour. Alternate tribunal members shall be compensated at the rate of $15.00 per hour for any time in attendance with the tribunal at the direction of the chairperson of the commission."

Question (1):

Your first question is whether the commission is correct in its belief that it has the power to compensate tribunal members. The governing statute, in our opinion, is RCW 49.60.120 which provides, in material part, as follows:

> "The [commission] . . . shall have the functions, powers and duties:
>
> "(1) To appoint an executive secretary and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

". . ." (Emphasis supplied)

An initial question is whether RCW 49.60.120(1), supra, applies at all to hearing tribunal members because of the fact that under RCW 49.60.250 they are appointed by the chairman of the commission, acting alone, and not by the whole commission. A negative answer to that question, however, would render meaningless the word "examiners"[4] and would be

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4 We are unclear as to the significance of the title "chief examiner" in RCW 49.60.120(1). In context, the position would seem to be permanent (or of indefinite duration) like that of the executive secretary. But tribunal members are appointed for each case separately. See, RCW 49.60.250, discussed below. Possibly the statute anticipates the day when some or all of the panel of hearing examiners from which tribunal members can be appointed are regular salaried personnel and the chief examiner is the chief of the pool of potential tribunal members. We need not resolve this question here, however, because we have concluded that the language of RCW 49.60.120(1) is broad enough to cover tribunal members, however they are designated.

contrary to the administrative and legislative understanding next discussed. We therefore reject such an interpretation which, of course, would require the conclusion that no tribunal members can be compensated, whether or not they are also members of the commission.

Any doubt that we might otherwise have as to the adequacy of RCW 49.60.120 (1) to authorize the compensation of tribunal members is removed by two facts: First, the commission's regulation (WAC 162.08.212, supra) is itself an authoritative ruling on the point by the agency with statutory authority to adopt rules to carry out the provisions of the law against discrimination. RCW 49.60.120(3). See also, Lindsay v. City of Seattle, 86 Wn.2d 698 at 711-712, 548 P.2d 320 at 329 (1976); cf. AGO 1976 No. 17. Second, our review of the appropriate budget documents confirms your assertion that the legislature did intend to provide the commission with funds to compensate hearing tribunals this biennium.[5] We therefore answer your first question in the affirmative. The amount of compensation to be paid is to be fixed by the commission, within the limitations of its appropriation.

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5 The commission's request for funds for this purpose is on pages 4, 5 and 20 of its General Justification Materials in support of its budget request for 1977-79. The Governor's 1977-79 proposed budget on pages 504-55 included $112,800 for "reimbursements of hearing tribunal members" and explained that

Question (2):

Your second question is whether the power to compensate hearing tribunal members includes members of the Human Rights Commission itself who serve as tribunal members; i.e., whether that power was intended by the legislature to extend to all tribunal members or

---

> ". . . hearings have been held in the past through volunteer services of at least one attorney and two other individuals per hearing. But the large number of hearings currently being held has created difficulties in recruiting free services, and reimbursement for hearing members is also proposed."

The word "reimbursement" must mean compensation because tribunal members have always been reimbursed for expenses and the $112,800 figure is far beyond what would be needed only for expenses of the number of tribunals projected. The final budget adopted by the legislature was not the same as the proposal but nothing in the record indicates an intention entirely to eliminate this or any other item.

only to those tribunal members who are not commissioners.[6]

Once again the statute on appointments and compensation (RCW 49.60.120, supra) reads as follows:

> "The [commission] . . . shall have the functions, powers and duties:
>
> "(1) To appoint an executive secretary and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.
>
> ". . ." (Emphasis supplied)

The statute does not authorize the human rights commissioners to compensate themselves as commissioners. Commissioners do not appoint themselves; they are appointed by the Governor. RCW 49.60.050. Nor has the legislature provided directly for the compensation of commissioners. They are authorized subsistence and travel expenses only. RCW 49.60.070. Therefore, it necessarily follows that

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6 Possible limitations on the power of the legislature to authorize the compensation of commissioners who serve as tribunal members are addressed in our response to question (3), below.

the commissioners, as such, serve without compensation. But the question presented is whether they may nevertheless be compensated when, as authorized by RCW 49.60.250, supra, they serve as members of a hearing tribunal.

The first issue to be considered is whether the word "examiners" in RCW 49.60.120(1) is tied only to the term "hearing examiners" in RCW 49.60.250, thus manifesting an intention to exclude from compensation those tribunal members who are commissioners. RCW 49.60.250 says that:

". . . The chairman of the [commission] . . . shall thereupon appoint a hearing tribunal of three persons, who shall be members of the [commission] . . . or a panel of hearing examiners . . ."

However, the authority to compensate extends to "other employees and agents," as well as to examiners and the other named positions and classes of appointees. The literal meaning of RCW 49.60.120(1), supra, as we have already indicated, is that the commission can compensate all persons whom it can appoint. And, as we have already concluded, this includes hearing tribunal members (reserving for the moment the status of those who are commissioners), although tribunal members are appointed by the chairman of the commission, acting alone.

We turn, then, to the more crucial inquiry which, as we view it, is whether commissioners perform a separate function when they serve as tribunal members. Or,

instead, is their performance as tribunal members merely an exercise of their functions as human rights commissioners? The answer to this question requires a somewhat more detailed examination of the nature of a hearing tribunal and its relationship to the commission.[7]

The following language from RCW 49.60.250[8] is all that the law against discrimination says about the appointment of hearing tribunals:

---

7 In this inquiry we look at the tribunal as a whole, rather than to the position of individual tribunal member. This is so because the tribunal is a deliberative body and acts as a whole, and because tribunal members appointed from the pool of commissioners have no status within the tribunal different from that of tribunal members appointed from the panel of hearing examiners.

8 The text of the statute quoted in this opinion is actually from the session law, § 18, chapter 37, Laws of 1957. The Revised Code of Washington erroneously omits the comma after "examiners."

". . . The chairman of the [commission] . . . shall thereupon appoint a hearing tribunal of three persons, who shall be members of the [commission] . . . or a panel of hearing examiners, acting in the name of the [commission] . . . , to hear the complaint and shall cause to be issued and served in the name of the [commission] . . . a written notice . . . requiring the respondent to answer the charges of the complaint at a hearing before such tribunal, at a time and place to be specified in such notice.

". . . No member or employee of the [commission] who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case. . . ."

From this we see that:

(1) A hearing tribunal "act[s] in the name of the [commission]."

(2) Commissioners are not automatically tribunal members; they must be appointed to the position.

(3) Commissioners cannot be appointed to a tribunal by the commission, or by themselves individually. Tribunal members are appointed by the chairman of the commission. The chairman is not

eligible to serve as a tribunal member because he or she also causes the notice of hearing to be issued.

(4) Commissioners have no duty to serve as tribunal members; they are simply eligible for appointment.

(5) It is unlawful for a commissioner who has not been appointed to a tribunal to participate in the deliberations of the tribunal, or to participate in the hearing except as a witness.

The functions of a hearing tribunal are then spelled out in later paragraphs of RCW 49.60.250 as follows:

> ". . .
>
> "If, upon all the evidence, the tribunal finds that the respondent has engaged in any unfair practice it shall state its findings of fact and shall issue and file with the [commission] . . . and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the tribunal, will effectuate the purposes of this chapter, and including a requirement for report of the matter on compliance.

Appendix A, page 12.

"If, upon all the evidence, the tribunal finds that the respondent has not engaged in any alleged unfair practice, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint.

". . ." (Emphasis supplied)

Thus, in summary, the tribunal determines issues of fact, applies the law, judges whether unfair practices have been committed, and issues an order disposing of the case. The tribunal exercises its own discretion as to the appropriate remedy when unfair practices are found. The order of a tribunal is issued to the parties and filed with the commission. Thus, the tribunal's product is not the commission's document until it is filed with the commission.

The rules of the commission (chapter 162-08 WAC) also bear upon the functions of a tribunal. Thus, we note that tribunal members can be removed only for cause on motion of a party made before the tribunal has made any ruling involving discretion. WAC 162-08-215, -217. The rules also specify that the commission is a party to the hearing before the tribunal.[9]

---

9 WAC 162-08-288(1) says:

"The parties to the [tribunal] hearing shall be the commission, through its counsel presenting the case in support of the complaint, . . ."

This is so because RCW 49.60.250 provides, in its second paragraph:

> ". . . The case in support of the complaint shall be presented at the hearing by counsel for the [commission] . . . :"

The commission is not empowered to review or revise the decision or order of the hearing tribunal. Instead, appeal from a tribunal order is to the superior court under the administrative procedure act, RCW 34.04.130.

From all of this it appears that a hearing tribunal, once appointed, exists independently of the commission and its members and is not subject to any direction or correction by them. We therefore conclude that the position of hearing tribunal member is separate from the position of human rights commissioner.

Commissioners are eligible for appointment as tribunal members, but they are under no duty to accept the appointment. When commissioners serve as tribunal members their actions are those of the tribunal and not of the Human Rights Commission.[10] Accordingly, it follows that the compensation of a person

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10 This is not to say that commissioners when serving as tribunal members, may not use their specialized knowledge gained as commissioners. See RCW 34.04.100(4). We presume that the legislature specified that commissioners may be appointed as tribunal members so that their special

serving as a hearing tribunal member should be determined for that position without regard to whether the person is compensated for a separate office held at the same time. And, therefore, it is our opinion that the authority to compensate hearing tribunal members for their service as such may include commissioners serving as tribunal members to the same extent as other tribunal members are now compensated under WAC 162-08-212, supra.

Question (3):

Turning to your third question, we first find nothing in the executive conflict of interest law (chapter 42.18 RCW) which would in any way prevent the payment of compensation to human rights commissioners for their service as hearing tribunal members.

It is most certainly true that this law does prohibit certain conflicts of interest in the executive branch of state government. Moreover, both the Human Rights Commission and its hearing tribunals are "agencies" covered by the act. See RCW 42.18.030. And, under the special definition in RCW 42.18.130, both the commissioners themselves and human rights tribunal members are "state employees" for purposes of the act. However, the executive conflict of interest act does not prevent the service of commissioners as tribunal members.

---

knowledge may be used by them and may be made available to other tribunal members.

This, as we have seen, is expressly authorized by RCW 49.60.250. In addition, an employee's interest in his or her own compensation from the state itself is simply not the kind of interest that this act was intended to regulate. See RCW 42.18.190, 42.18.010.

There is, however, another "law" that could prevent, temporarily, the compensation of hearing tribunal members who are commissioners. We have reference to the constitutional prohibition against raising the compensation of certain officers during their terms of office. Washington Constitution, Article III, § 1, (Amendment 54) reads as follows:

> "The compensation of all elective and appointive state, county, and municipal officers who do not fix their own compensation, . . . may be increased during their terms of office to the end that such officers and judges shall each severally receive compensation for their services in accordance with the law in effect at the time the services are being rendered.
>
> "The provisions of section 25 of Article II (Amendment 35), . . . insofar as they are inconsistent herewith are hereby repealed." (Emphasis supplied)

The referenced Article II, § 25 says:

> ". . . nor shall the compensation of any public officer be increased or diminished during his term in office. . . ."

The effect of this constitutional provision is thus to limit the former general prohibition against raising the compensation of a public officer during his or her term so that it now applies only to officers who "fix their own compensation."

Article II, § 25 (as now limited by Amendment 54) applies to all state officers, not just to legislators. City of Everett v. Johnson, 37 Wn.2d 505, 224 P.2d 617 (1950). Also, providing compensation for the first time for an office that was previously uncompensated is an "increase" in compensation for purposes of the constitutional provision. State ex rel. Livingston v. Ayer, 23 Wn.2d 578, 161 P.2d 429 (1945). Adding new duties does not alone justify increasing the compensation for an office. AGO 53-55-137. An officer is covered by the prohibition if he or she is a voting member of a body of officers who fix the compensation. AGO 1968 No. 36. The courts have not hesitated to strike down schemes, including the creation of dual offices, that were designed to get around the prohibition. State ex rel. Troy v. Yelle, 27 Wn.2d 99, 176 P.2d 459 (1947); State ex rel. Livingston v. Ayer, 23 Wn.2d 578, 161 P.2d 429 (1945).

We do not see in the present circumstances any element of subterfuge to avoid the effect of the foregoing constitutional prohibition against increasing compensation during a term of office. As we understand it, the purpose of the commissioners and the legislature in now providing compensation for tribunal members was to insure an

adequate supply of tribunal members who are not commissioners. The issue is simply whether the constitution prevents tribunal members who are commissioners from receiving the new compensation during their respective terms of office as commissioners because they are members of the same body which fixed the compensation.

Tribunal members as such do not fix their own compensation, but when a tribunal member is also a commissioner that person, as a commissioner, has the authority to fix his or her compensation as a tribunal member. The question thus posed is whether the constitutional prohibition in question is sufficiently broad to include the authority of the individual as a member of a separate body to participate in fixing his or her own compensation as a tribunal member; or whether it should be construed narrowly to include only the compensation-fixing authority of the office to which the compensation is attached. This precise point has never been addressed by the Washington courts or by our office. Nor are we aware of any authority from other states on the question because few states, if any, have a constitutional salary increase limitation such as ours that applies only to officers who fix their own compensation.

Our only guidance, therefore, is the spirit with which the salary limitation provisions have been applied by our courts. Again, that spirit has been one of extraordinary strictness; i.e., taking a broad view of the prohibition and a strict or narrow view of the exception. The Washington court has even discarded the usual presumptions of the constitutionality

of statutes and of the good faith of legislators and has overturned statutes on the basis of the apparent motive of the legislators. Troy and Livingston, supra. In view of this history our best judgment is that the court will take the stricter of the two possible constructions of the term "officers who do not fix their own compensation;" i.e., that the prohibition broadly applies to the authority of a person to fix his or her own compensation whether the compensation is for the office empowered to fix the compensation or for a separate office held by that person. We therefore conclude that the compensation of tribunal members who are also commissioners is subject to the quoted clause of Article II, § 25, supra, and cannot be increased during the person's term of office as a commissioner.[11] Cf. AGO 53-55-137.

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11 Thus, for example, a human rights commissioner whose current five-year term (see, RCW 49.60.060) began in 1973 will not be able to draw compensation for service as a tribunal member under WAC 162-08-212, supra (which, as above noted, was adopted in July, 1977) until 1978, after that term ends, etc.

We trust that the foregoing will be of some assistance to you.

Very truly yours,

SLADE GORTON
Attorney General

/s/
MORTON M. TYTLER
Senior Assistant Attorney General

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WAC 162-08-215 Removal of tribunal members for cause. (1) Motion Authorized. Any party or attorney for a party may move for the removal of one or more tribunal members or alternates for cause as provided in this section.

(2) Time for Filing. The motion must be filed with the clerk within ten days after the notice of hearing was served on the moving party, except that a motion to remove a tribunal member who has been appointed after the notice of hearing has been served may be filed within ten days after notice of appointment of that tribunal member has been received by the moving party.

(3) To Whom Directed. The motion shall be directed to the chairperson of the commission and filed with the clerk.

(4) Contents of Motion; Affidavits. The motion must state the reason why removal is requested and it must be supported by affidavits that establish the factual basis for the motion, unless the factual basis is of record in the case or is already known to the chairperson. Affidavits must be made on personal knowledge, must set forth facts that are admissible in evidence in an administrative hearing, and must show affirmatively that the affiant is competent to testify to the matters stated in them. Authenticated copies of all papers or parts of papers referred to in an affidavit must be filed with the affidavit, unless they are already on file with the commission or are published and are generally available. If the moving party has reason to believe

that evidence in support of the motion exists and the moving party cannot with reasonable diligence obtain the evidence in proper form within the time allowed for filing the motion, the moving party may make a request in the motion for additional time to submit evidence. The request for additional time must be supported by an affidavit which describes as specifically as possible the evidence and the efforts that have been made and will be made to get it, and the time needed to obtain and file the evidence. The chairperson may grant additional time if the chairperson finds that the described evidence would be usable and helpful in passing on the motion and if the moving party has shown diligence in attempting to get it.

(5) Grounds for Removal. A member of a hearing tribunal shall be removed if the chairperson finds that the motion and supporting affidavits show that the person is disqualified under the law of this state on disqualification of judicial and quasi-judicial officers. Grounds for disqualification include:

(a) Prejudgment concerning issues of fact about parties in the particular case;

(b) Partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party, as distinguished from issues of law or policy;

(c) An interest whereby one stands to gain or lose by a decision either way;

(d) Any interest, pecuniary or not, the probable and natural tendency of which

is to create a bias in the mind of the person for or against a party; and

(e) That service of the person would cause the tribunal to appear to a reasonably prudent and disinterested person to lack the appearance of fairness, impartiality, and neutrality.

(6) Ruling on Motion. If the chairperson of the commission finds from the facts established by the motion and supporting affidavits that the tribunal member is disqualified, the chairperson shall issue an order removing the member from service on the tribunal.

(7) Limitations on Motions. No party and attorney for that party may make more than one motion for removal of the same tribunal member from the same tribunal, and no motion may be made after the tribunal member has made or participated in making any ruling involving discretion.

(8) Disposition of Denied Motions. In order to avoid a possible prejudicial effect on the tribunal member, a ruling denying a motion for removal shall not be revealed to the tribunal or its members by the chairperson or any representative of the commission. Motions and other papers filed under this section shall not be filed in the tribunal's case file or otherwise revealed to the tribunal or its members by representatives of the commission but shall be included in the record certified to superior court for purposes of appeal or enforcement, as is provided in WAC 162-08-231(5). Tribunal members

are directed not to examine files concerning them or the case, other than the tribunal's case file, during pendency of the hearing and are directed not to inquire as to whether a party or attorney has moved for removal of a tribunal member or alternate. Members of the public are requested not to reveal to a tribunal member the fact that a motion for removal has been made and denied. The procedure in this subsection is intended to establish a high standard of fairness, not a minimum standard of fairness. Knowledge by a hearing tribunal member about a motion for his or her removal shall not disqualify the member from continuing to serve, in the absence of evidence of actual bias arising from special facts. [Order 35, § 162-08-215, filed 9/2/77; Order 33, § 162-08-215, filed 3/21/77.]

WAC 162-08-217 Objection to manner of appointment. (1) Authorized. A party aggrieved by the manner in which a hearing tribunal has been appointed may file with the clerk a motion to the chairperson of the commission for an order setting aside the chairperson's order appointing the hearing tribunal, in whole or in part.

(2) Time for Motion. The motion must be filed within 15 days after the aggrieved party has been served with the notice of hearing.

(3) Grounds for Motion. The motion to set aside the order appointing hearing tribunal must be based on an error of law or procedure, other than appointment of a disqualified tribunal member or alternate, that invalidates the appointment of the entire panel of the tribunal, or of a member, members, or alternate. Each ground for the motion shall be specifically set out and supported by legal authority.

(4) Procedure. The motion shall be considered and decided as provided in WAC 162-08-271.

(5) Effect on Time of Hearing. The chairperson may postpone the time of hearing if the chairperson does not have time to dispose of a motion under this section before the scheduled hearing date.

(6) Where Filed. Papers filed under this section shall not be placed in the file of the tribunal hearing during the pendency of the hearing. If the case is brought to the superior court for review or enforcement, papers filed under this section

shall be included in the record certified to the superior court, as provided in WAC 162-08-231. [Order 33, § 162-08-217, filed 3/21/77.]

WAC 162-08-261 Complainant's participation. (1) Notice of Independent Appearance. A complainant who desires to submit testimony or otherwise participate in the hearing as a party and not to leave the case in support of the complaint to be presented solely by counsel for the commission, must serve and file a notice of independent appearance within ten days after the notice of hearing is served on that complainant. The notice shall state the address where notices to the complainant shall be sent and it shall state whether the complainant elects to prove additional charges as provided in paragraph (2) of this rule.

(2) Election to Prove Additional Charges. A complainant who has filed a notice of independent appearance stating an intention to do so may at the hearing offer proof of averments included in the original complaint or in amendments to the original complaint made by the complainant, whether or not the averments are included in the amended complaint under which counsel for the commission is proceeding. For purposes of this section, the complainant may amend the original complaint without regard to intervening amendments made by the commission. The complainant may serve and file an amended complaint with a notice of independent appearance, or thereafter as provided by these rules. If no amended complaint is served with a notice of independent appearance that states an intention to prove additional charges, the clerk shall promptly place the original complaint in the file for the hearing tribunal. Nothing done by the complainant under

this rule shall place any duty on counsel for the commission to seek to prove matters not averred in the amended complaint accompanying the notice of hearing, or subsequent amendments by the commission.

(3) Appearance Without Election. If the complainant files a notice of independent appearance which does not state that he or she elects to prove additional charges, then the complainant's participation in the hearing shall be confined to the matters raised by the amended complaint filed with the notice of hearing, and subsequent amendments made by the commission.

(4) When No Independent Appearance. If the complainant does not file a notice of independent appearance as provided by this rule, the case in support of the complaint shall be presented solely by counsel for the commission. [Order 35, § 162-08-261, filed 9/2/77; Order 7, § 162-08-261, filed 1/19/68.]